No. ____

IN THE

Supreme Court of the United States

RENESAS TECHNOLOGY AMERICA, INC.,
Petitioner,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 2, 2006

QUESTION PRESENTED

Under U.S. trade laws, when the Commerce Department imposes antidumping duties on imported goods, importers make cash deposits of estimated duties at the time of importation. Upon request, Commerce conducts an annual review to determine the actual amount of antidumping duties owed during the period of review. After the review, Commerce orders liquidation of the entries with actual duties assessed based on the review results.

In this case, Commerce was requested to review the antidumping duties owed on imported goods "*manufactured and/or sold*" by a particular producer. After Commerce completed the review, Petitioner Renesas sought to have its entries liquidated and actual duties assessed on its imported goods in accordance with the results of the review, in which Commerce calculated an actual duty rate lower than the initial estimated cash deposit rate. Commerce refused, on the basis that Petitioner had purchased the goods from a *reseller*, rather than directly from the *producer*. On appeal, the Court of International Trade ("CIT") overruled Commerce, but the Federal Circuit reversed the CIT. The question presented is:

When a request for administrative review of antidumping duties encompasses goods manufactured by a producer, does 19 U.S.C. § 1675(a)(2)(C) require that the review results be the basis for the assessment of duties on imports when the importer purchases the goods from a third-party reseller rather than directly from the producer?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding in the United States Court of Appeals for the Federal Circuit are the same as the parties to this proceeding: Petitioner Renesas Technology America, Inc. ("Renesas") and Respondents United States and Micron Technology, Inc.

Corporate Disclosure Statement: Renesas Technology Corp., of Japan ("RTC") is the parent corporation of Renesas. Hitachi, Ltd. and Mitsubishi Electric Corporation, which are both publicly held companies, own 55% and 45% of RTC, respectively.

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Renesas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is unpublished but is available as *Renesas Technology America, Inc. v. United States*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005)

and is reprinted in the Appendix ("App.") at 1-2. The order of the court of appeals denying panel and en banc rehearing is available at 2005 U.S. App. LEXIS 21877 and is reprinted at App 67-68.

The court of appeals reversed the Court of International Trade's decision in favor of Renesas, which is unpublished but available as *Renesas Technology America, Inc. v. United States,* No. 00-00114, 2003 Ct. Intl. Trade LEXIS 105 (Ct. Int'l Trade Aug. 18, 2003), and is reprinted at App. 4-19.

The decision of the court of appeals was based in pertinent part on its earlier decisions in *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003), *reh'g denied,* 2003 U.S. App. LEXIS 26770 (Fed. Cir. Dec. 20, 2003) ("*Consolidated Bearings I*"), reprinted at App. 26-49, and *Consolidated Bearings Co. v. United States*, 412 F.3d 1266 (Fed. Cir. 2005) ("*Consolidated Bearings II*"), reprinted at App. 50-66, as well as on its simultaneous decision in a companion case to this one, *Nissei Sangyo America, Ltd. v. United States*, No. 04-1469, -1492, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005), *reh'g denied,* 2005 U.S. App. LEXIS 24124 (Fed. Cir. Oct. 18, 2005) ("*Nissei Sangyo*"), reprinted at App. 20-25. A petition for a writ of certiorari from the Federal Circuit's decision in *Nissei Sangyo* was filed in this Court by Hitachi High Technologies America, Inc., successor to Nissei Sangyo America, on January 17, 2006, and docketed on January 24, 2006, as No. 05-918, *Hitachi High Technologies America, Inc. v. United States.*

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Federal Circuit entered its judgment and opinion on July 1, 2005, and denied Renesas' petition for panel rehearing and rehearing en banc on September 19, 2005. Renesas' application to extend the time to file a petition for writ of certiorari until February 2, 2006, was granted by Chief Justice Roberts on December 5, 2005. Supreme Court Docket No. 05A508. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

19 U.S.C. § 1675(a)(1) provides:

> At least once during each 12-month period beginning on the anniversary of the date of publication of ... an antidumping duty order under this subtitle ..., the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—
>
> ... (B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, ...
>
> and shall publish in the Federal Register the results of such review, together with

> notice of any duty to be assessed [or] estimated duty to be deposited.

19 U.S.C. § 1675(a)(2)(A) provides:

> For the purpose of paragraph (1)(B), the administering authority shall determine—
>
> (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and
>
> (ii) the dumping margin for each such entry.

19 U.S.C. § 1675(a)(2)(C) provides:

> The determination under this paragraph shall be the basis for the assessment of ... antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.

19 C.F.R. § 351.213(b) (2005) provides:

> (1) Each year during the anniversary month of the publication of an antidumping ... order, a domestic interested party ... may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order ..., if the requesting person

> states why the person desires the Secretary to review those particular exporters or producers.
>
> (2) During the same month, an exporter or producer covered by an order ... may request in writing that the Secretary conduct an administrative review of only that person.
>
> (3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only an exporter or producer ... of the subject merchandise imported by that importer.

STATEMENT OF THE CASE

A. The U.S. Antidumping System

This case arises under the U.S. antidumping law, 19 U.S.C. § 1673 *et. seq.*, which is among the most important U.S. trade laws. Some $14 billion worth of imports into the United States were covered by antidumping tariffs imposed between 1994 and 2003. Renesas, like many U.S. companies, has been required to pay estimated antidumping duties on imported products. The decision of the Federal Circuit will potentially cost U.S. businesses many millions of dollars by denying them the benefit of the antidumping duty assessment rates calculated for the actual producers of the goods they import, rates

that are frequently significantly lower than the estimated duties that are initially imposed.

Under the U.S. antidumping scheme, the Commerce Department issues antidumping duty orders covering imported goods that are found, after an investigation, to have been sold in the United States below their fair value and to have injured domestic industry. *See* 19 U.S.C. § 1673. After Commerce issues an antidumping duty order, importers make cash deposits of estimated antidumping duties at the time subject merchandise enters the United States. *Id.* § 1673e(a)(3). The cash deposit rate is the rate calculated by Commerce for each individually investigated producer or exporter; for producers and exporters not individually investigated, the cash deposit rate is the "all others" rate, which is the weighted average of the rates calculated for the individually investigated producers and exporters. *Id.* § 1673b(d). Thus, there are generally two cash deposit rates potentially applicable to estimated duties after the initial investigation: the producer's deposit rate and the "all others" rate.

The final ascertainment and imposition of duties ("liquidation") on these entries is suspended. *Id.* § 1673b(d)(1)-(2). The final decision as to the amount of antidumping duties owed, if any, typically is not made until years after importation when an import entry is liquidated. In other words, "[u]nlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping ... duties is determined after merchandise is imported." 19

C.F.R. § 351.212(a) (2005). Because the U.S. antidumping duty system is "retrospective," it is critical that government officials charged with administering the antidumping duty laws not depart from the "rules of the game" established by Congress and relied upon by importers.

Because the cash deposit rate is only an estimate, and because importers and U.S. producers often disagree over whether the estimated rate is too high or too low, Commerce, if requested to do so by an authorized party,[1] annually determines the actual antidumping duty rate that should be charged on merchandise imported during the time period Commerce reviews (usually a twelve-month period known as a "period of review" ("POR")). 19 U.S.C. § 1675(a)(1). The scope of the review is determined by the scope of the authorized party's request. *See id.* (if "a request for such a review" is received, Commerce shall "review, and determine ... the amount of any antidumping duty"); 19 C.F.R. § 351.213(b)(1) (2005) (a "domestic interested party" may "request in writing that the Secretary conduct an administrative review ... *of specified individual exporters or producers* covered by an order ... if the requesting person states why the person desires the

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[1] Parties authorized to request an administrative review of antidumping duties are "domestic interested parties," foreign governments, exporters, producers, and importers. *See* 19 C.F.R. § 351.213(b) (2005); *see also* 19 U.S.C. § 1677(9) (defining "interested party").

Secretary to review *those particular exporters or producers*") (emphasis added).[2]

Upon conclusion of the review, and assuming that no party seeks judicial review of Commerce's determination, Commerce orders liquidation and duty assessment for suspended entries of merchandise covered by the determination (that is, goods encompassed by the administrative review request) based on the results of the review. *See* 19 U.S.C. § 1675(a)(2)(C) ("The determination under this paragraph shall be the basis for the assessment of ... antidumping duties *on entries of merchandise covered by the determination.*") (emphasis added); 19 C.F.R. § 351.221(b)(6) (2005) (requiring Commerce upon completion of the review to "instruct the Customs Service to assess antidumping duties ... on the subject merchandise *covered by the review*") (emphasis added).[3]

Additionally, the weighted-average dumping margin calculated for each producer in a review proceeding becomes the new cash deposit rate for estimated duties on later entries of merchandise manufactured by that *producer*. 19 U.S.C. § 1675(a)(2)(C). This producer-specific cash deposit

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[2] At the time of the review requests at issue in this case, a predecessor version of 19 C.F.R. § 351.213(b) (2005) was in effect. The language of the predecessor regulation, 19 C.F.R. § 353.22(a) (1995), is substantively identical to the current version.

[3] If a party does seek judicial review in the Court of International Trade, liquidation of the entries is usually enjoined pending the outcome of the litigation.

rate, as directed by Commerce in accordance with the statute, *id.*, applies regardless of whether the goods are exported to the United States by the producer itself or by a third-party reseller of goods manufactured by the producer, unless Commerce has previously calculated an individual cash deposit rate for that reseller. *See* 19 C.F.R. § 351.107(b)(2) (2005). The "all others" cash deposit rate, however, as established in the initial investigation, remains unchanged. *See, e.g., Micron Tech. Inc. v. United States*, 117 F.3d 1386, 1392 (Fed. Cir. 1997).

B. Factual and Procedural Background

In 1993, following issuance of an antidumping duty order on certain dynamic random access memory semiconductors ("DRAMS") from Korea,[4] Commerce instructed the U.S. Customs Service (now known as the Bureau of Customs and Border Protection, or "CBP") to require importers of DRAMS originating in Korea and manufactured by LG Semicon Co., Ltd. ("LG") to post cash deposits equal to 4.97%, the weighted-average dumping margin calculated by Commerce for LG in the original investigation. Commerce also instructed CBP to require importers of Korean DRAMS manufactured by a different producer, Hyundai Electronics Co., Ltd. ("Hyundai"), to post cash deposits equal to 11.16%.

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[4] This antidumping duty order is published as *DRAMS of One Megabit and Above From Korea*, 58 Fed. Reg. 27,520 (May 10, 1993).

Starting in July 1993, Petitioner Renesas imported into the United States numerous shipments of Korean DRAMS manufactured by LG but purchased by Renesas from a third-party reseller, posting on each entry cash deposits at the 4.97% LG investigation rate.

In May 1994, and again in May 1995, Respondent Micron Technology, Inc. ("Micron"),[5] a "domestic interested party," requested pursuant to 19 U.S.C. § 1675(a)(1) that Commerce conduct an administrative review of "the subject merchandise *manufactured and/or sold by*" LG and Hyundai during the first and second annual review periods. Court of Appeals ("C.A.") JA66-67; JA102-03 (emphasis added). In June 1994, and again in June 1995, Commerce complied with Micron's request and initiated administrative reviews of imports of DRAMS manufactured by LG and the other Korean producers identified by Micron. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 59 Fed. Reg. 30,770 (June 15, 1994); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 60 Fed. Reg. 31,447 (June 15, 1995). Entries of all DRAMS manufactured by LG, including Renesas' entries, thus were covered by Commerce's review for each of the first two reviews of the DRAMS antidumping order.

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[5] Micron was the petitioner in the investigation that resulted in the initial imposition of antidumping duties on the relevant imports.

At the outset of the first review, Commerce expressly confirmed for the record that, in accordance with the statute and its established policy, entries of *all* subject merchandise produced by the reviewed producers would be treated according to the results of the reviews for the producers, with the exception of imports from any reseller for which a separate review had been requested and for which a separate rate was calculated in the review. C.A. JA71. Ultimately, Commerce calculated weighted-average dumping margins for LG in the first and second reviews of 0.00% and 0.01%, respectively. *DRAMS of One Megabit or Above from Korea*, 61 Fed. Reg. 20,216 (May 6, 1996); *DRAMS of One Megabit or Above from Korea*, 62 Fed. Reg. 965 (Jan. 7, 1997). Thus, because the reseller from which Renesas imported its entries of LG DRAMS had not received its own calculated rate, Renesas expected that its entries would be liquidated at the actual rates calculated for LG in the respective reviews, not at the 4.97% estimated cash deposit rate.

Micron appealed to the CIT the results of both the first and second reviews with respect to LG but not with respect to Hyundai. Thus, starting in 1997 Commerce issued instructions to CBP to liquidate all Hyundai-made DRAMS. In each of these instructions, Commerce ordered CBP to liquidate all entries of DRAMS manufactured by Hyundai and imported during POR 1 and POR 2, without regard to the identity of the exporter or the importer, at the rate Commerce calculated for Hyundai in the reviews, not the cash deposit rate. C.A. JA111(4)-

111(5); JA114-15; JA118-19; JA120-25. Liquidation of all entries of LG-made DRAMS (including Renesas' entries), in contrast, remained suspended pending the outcome of the CIT proceedings pursuant to injunctions issued by the CIT on motions by Micron.

In 1996, Micron requested a third administrative review of merchandise "manufactured and/or sold" by LG and Hyundai. In July 1997, Commerce published the final results of the ensuing third review of the DRAMS antidumping order. Because no party appealed the margin calculation for LG, liquidation was not stayed, and in September 1997 Commerce issued instructions ordering CBP to liquidate all entries of DRAMS produced by LG, without regard to the identity of the exporter or importer, at the rate Commerce calculated for LG in the third review, *i.e.*, zero. C.A. JA116-17. All of the DRAMS manufactured by LG and imported by Renesas from its third-party reseller during the third review period, just as Renesas had done during the first and second review periods, were liquidated by CBP at the LG review rate (rather than the cash deposit rate) in accordance with these instructions.

In October 1998, Commerce published in the *Federal Register* a proposal to change its policy concerning the assessment of antidumping duties on merchandise imported from a reseller. *Notice and Request for Comment on Policy Concerning Assessment of Antidumping Duties*, 63 Fed. Reg. 55,361 (Oct. 15, 1998). Commerce proposed that if a producer did not know its merchandise was destined for the United States and the reseller did not have a

separate rate, then Commerce would liquidate entries not at the producer's assessment rate found in the review, but rather at the "all others" rate (the weighted average of the rates of all investigated producers) determined in the original investigation.[6]

Although Commerce stated that its new proposal would apply only prospectively, Commerce without notice or explanation began in some cases issuing liquidation instructions that contradicted its long-settled policy and denied importers the review rate earned by the producer of the imported goods, even in old cases (delayed by court litigation) in which Commerce had been requested to review all goods manufactured by the producer and the opportunity for resellers or importers to request individual reviews had long passed.

In Renesas' case, after the CIT sustained Commerce's final review results for LG in both the first and second reviews that were subject to appeal, Commerce issued liquidation instructions to CBP with respect to LG DRAMS on November 1, 1999. In these instructions, Commerce abandoned its established policy and directed CBP to liquidate the entries of certain importers of LG products (i.e., those that purchased directly from LG) at confidential importer-specific rates. C.A. JA133-36. It directed Customs to liquidate all other importers'

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[6] In 2003, Commerce finalized the change in its assessment policy firs announced in the October 1998 notice. *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954 (May 6, 2003) (Notice of Policy).

entries (i.e., those, like Renesas, that purchased from third-party resellers rather than directly from LG) at the 4.97% cash deposit rate. *Id.* Thus, not only did Commerce abandon its previous policy of ordering liquidation at the producer's rate, but the agency inexplicably did not even implement its newly proposed policy of liquidating reseller entries at the "all others" rate.[7] Instead, Commerce ordered CBP to liquidate all importers' entries (including those made by Renesas) of merchandise purchased from resellers (rather than directly from LG) at the 4.97% cash deposit rate, an option never contemplated by any party to the proceeding at any time.

Thus, like many U.S. companies, Renesas ran afoul of the antidumping laws through no fault of its own. On the contrary, before purchasing semiconductors produced by the Korean producer LG, Renesas carefully reviewed LG's pricing practices, and was satisfied that LG would earn a zero or *de minimis* rate in Commerce's reviews, as

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[7] To be sure, the producer's cash deposit rate was more favorable than the "all others" cash deposit rate that Commerce had announced would be the new policy for importers that purchase from unreviewed resellers. Nevertheless, the producer's rate was and is more unfavorable than the actual review results mandated by statute. In short, Commerce's action in this case (assessing actual duties on an importer that purchases from a reseller on the basis of the *producer's* cash deposit rate) and Commerce's new policy (assessing duties on such importers on the basis of the initial "*all others*" cash deposit rate) suffer from the same defect: the failure to assess such duties in accordance with the *review* results, as mandated by 19 U.S.C. § 1675(a)(2)(C).

indeed it did. Because Renesas also knew (i) that Commerce's policy—in accordance with the requirements of 19 U.S.C. § 1675(a)(2)(C)—was to liquidate imports purchased from unreviewed resellers at the producer's review rate, and (ii) that Micron had requested that the review cover all DRAMS produced by LG, Renesas reasonably chose not to request an individual review of its supplier but rather to rely on liquidation at the LG rate. And indeed, if liquidation had proceeded in a timely manner, Renesas' expectations would have been fulfilled. Unfortunately, court litigation delayed liquidation, and by the time the litigation concluded, Commerce's interpretation of Section 1675(a)(2)(C) had changed.

Renesas appealed Commerce's action to the CIT, and the CIT granted summary judgment in favor of Renesas on August 18, 2003. The CIT found that the challenged instructions were contrary to law because Renesas "had no reason to know that Commerce would change" its "past practice" of liquidating entries imported from third-party resellers at the rate established for the producer of the merchandise. App. 18-19.

Commerce appealed the CIT decision to the Federal Circuit. Renesas defended the CIT decision on various grounds, including, *inter alia,* that because Micron's requested review applied to goods "manufactured and/or sold by" LG, Commerce was required under 19 U.S.C. § 1675(a)(2)(C) to apply the results of that review to Renesas' imports, which were of goods manufactured by LG.

The Federal Circuit reversed the CIT in a brief unpublished opinion, holding that as discussed in the companion appeal (decided the same day) of *Nissei Sangyo America, Ltd. v. United States*, App. 20-25, which in turn had relied on the Federal Circuit's decision in *Consolidated Bearings II*, App. 50-66, Commerce had not arbitrarily changed its policy regarding the liquidation of entries of importers that purchase from unreviewed resellers. App. 1-2.

With regard to Petitioner Renesas' statutory argument under 19 U.S.C. § 1675(a)(2)(C), the Federal Circuit held that as discussed in the companion appeal of *Nissei Sangyo America, Ltd*, App. 20-25, this statutory argument was foreclosed by the court's holding in *Consolidated Bearings I* "that an unreviewed reseller is not statutorily entitled [under 19 U.S.C. § 1675(a)(2)(C)] to the manufacturer's review rate." App. 2, citing App. 26-49. In rejecting Renesas' statutory argument, the Federal Circuit opinion made no mention that Micron's request for review had specifically applied to goods "manufactured and/or sold by" LG.

Thus, the Federal Circuit's statutory interpretation here stands for the astonishing proposition that even if Commerce is requested to review the duties applicable to goods "manufactured and/or sold" by a particular producer, importers that purchase from third-party resellers are not entitled to the benefit of the results of that review, notwithstanding the statutory mandate that the "determination under this paragraph"—i.e., resulting from the request for review made pursuant

to 19 U.S.C. § 1675(a)(1)—"shall be the basis for the assessment of . antidumping duties on entries of *merchandise covered by the determination.*" 19 U.S.C. § 1675(a)(2)(C) (emphasis added).

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit's Construction of 19 U.S.C. § 1675(a)(2)(C) Imposes Substantial and Needless Costs on U.S. Importers That Purchase from Resellers

U.S. law provides a powerful legal weapon to domestic industries unhappy with foreign competition: the antidumping law found at 19 U.S.C. § 1673 *et. seq.* The interpretation and enforcement of the antidumping law is extremely important to U.S. importing businesses because it can impose substantial if not prohibitive costs on imported goods:

> [A]ntidumping measures do considerable harm to both American consumers and American business. Research by Michael Gallaway, Bruce Blonigen, and Joseph Flynn found that in 1993 antidumping and antisubsidy tariffs (the latter are meant to counteract the effects of foreign subsidies) had economic costs of $4 billion ($5 billion in today's prices), with most of the harm caused by antidumping tariffs, which outnumber antisubsidy measures by more than three to one. Since then, the

> economic cost of antidumping laws has likely increased. Although average antidumping tariffs have fallen somewhat since 1993, from 50.6 percent between 1991 and 1993 to 41.9 percent between 1997 and 1999, the value of imports affected has increased substantially. Some $14 billion worth of imports were covered by antidumping tariffs approved between 1994 and 2003, up from $8.34 billion between 1984 and 1993.

N. Gregory Mankiw & Phillip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, FOREIGN AFF., July/Aug. 2005, at 107, 112-13.

The Federal Circuit's interpretation of 19 U.S.C. § 1675(a)(2)(C) here, if not reversed, will impose unwarranted additional costs on U.S. importing businesses. In light of the significance of antidumping duties to U.S. businesses that have to pay them, it is not surprising that U.S. companies such as Renesas carefully take these duties into account when planning to import needed products. For this planning to be effective, businesses need to be able to rely on Commerce to administer the antidumping law in a predictable way that accords with the statutory text.

Specifically, under the retrospective system of duty assessment established by U.S. law, Commerce upon request conducts annual reviews of individual foreign producers whose goods are subject to an antidumping order in the United States. After the

review is completed, Commerce directs CBP to assess duties on all entries during the period of review based on the results of the review for each producer. This methodology is mandated by 19 U.S.C. § 1675(a)(2)(C), which provides that the determination in the annual review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination."

For many years, Commerce interpreted this statutory mandate in a straightforward manner, applying rates calculated in annual reviews to all entries of merchandise produced by individual producers, regardless of whether the producer was also the exporter. In October 1998, however, Commerce published in the *Federal Register* its proposal to change its policy concerning the assessment of antidumping duties on merchandise imported from a reseller. Under that policy, as discussed above in the Statement of the Case, importers that purchase from resellers are subject to liquidation of their duties at the "all others" cash deposit rate set in the original investigation unless the importer requests a review of its reseller.

As now implemented, Commerce's new interpretation of Section 1675(a)(2)(C) imposes potentially great costs on U.S. businesses. The "all others" rate is usually higher, and often significantly higher, than the rates calculated for individual producers in annual reviews. The all others rate, moreover, never changes throughout the duration of an antidumping order, even when the high investigatior rates upon which it was based are

superseded. Thus, the Federal Circuit's decision upholding Commerce's erroneous interpretation of Section 1675(a)(2)(C) dooms U.S. companies to pay excessive duties on every importation into the United States of subject goods purchased from resellers unless each reseller undergoes an individual review, an expensive and burdensome ordeal indeed. *See Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541, 1546 (Fed. Cir. 1988) ("At least this much is clear: Administrative reviews of sales are expensive and burdensome."); *Dofasco Inc. v. United States*, 326 F. Supp. 2d 1340, 1345 (Ct. Int'l Trade 2004) ("The court agrees that [antidumping administrative] reviews can be costly and time-consuming.").

If an importing business chooses to forgo the burdensome and expensive process of seeking review for its reseller's goods, the Federal Circuit's statutory interpretation precludes the very result contemplated by the statutory and regulatory scheme when an interested party requests, as is commonly done, a review for all goods *manufactured* by (as opposed to directly sold by) a particular producer. The statutory and regulatory scheme contemplates that the result of such a review is to be the basis on which antidumping duties are assessed for *all* goods that were subject to the review.

Moreover, the Federal Circuit's interpretation of 19 U.S.C. § 1675(a)(2)(C) leads to irrational, if not bizarre, economic results. As an importer of a commodity product like DRAMS, Renesas followed the market and should have had the same review result as LG if Renesas had requested its own review

of its reseller or of LG. Thus, seeking its own redundant review would have been pointless. However, under the Federal Circuit's decision, importers such as Renesas are saddled with the requirement to pay exorbitant duties that bear no relationship to the actual economic transactions over the relevant time period because of their failure to seek their own redundant review of the producer or reseller of the imported goods.

In sum, the decision of the Federal Circuit will potentially cost importers many millions of dollars, whether by denying them the benefit of the antidumping duty assessment rates calculated for the actual producers of the goods they import, or by requiring such importers to seek costly and redundant administrative reviews. If this Court does not review the Federal Circuit's interpretation of the statute at issue, no other avenue will be available to the many businesses that are adversely affected. This issue will not percolate among the circuits, and there can be no circuit conflict, because the Federal Circuit, as the exclusive forum for appeals from the CIT, *see* 28 U.S.C. § 1295(a)(5), has the last word on the matter—subject only to this Court's intervention.

II. The Federal Circuit's Construction of 19 U.S.C. § 1675(a)(2)(C) Is Erroneous

A. The Federal Circuit's Construction of 19 U.S.C. § 1675(a)(2)(C) Ignores the Statutory Context

The Federal Circuit in this case rejected Renesas' statutory argument on the basis of the court's earlier decision in *Consolidated Bearings I*. *See* App. 2. In *Consolidated Bearings I,* the Federal Circuit held that 19 U.S.C.§ 1675(a)(2)(C)

> requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The "entries" must be "covered by the determination" to gain entitlement to the review's results as the "basis for the assessment" of duties.

App. 44.

The fatal error in *Consolidated Bearings I* is that it interprets 19 U.S.C.§ 1675(a)(2)(C) in isolation and ignores the crucial role of the initial request for review in the statutory scheme, because that request determines the scope of the ensuing review. Section 1675(a)(2)(C) provides that the determination in the annual review "shall be the basis for the assessment of ... antidumping duties on entries of *merchandise*

covered by the determination." 19 U.S.C. § 1675(a)(2)(C) (emphasis added). To understand the phrase "entries of merchandise covered by the determination," it is necessary to understand that "if a request for such a review has been received," *id.* § 1675(a)(1), Commerce is required to "review, and determine ... the amount of any antidumping duty," *id.* § 1675(a)(1)(B), of "each entry of the subject merchandise," *id.* § 1675(a)(2)(A). Thus, a *request* for review determines the scope of "each entry of the subject merchandise" included within the review, which in turn determines the scope of "merchandise covered by the determination" under Section 1675(a)(2)(C).

This reading of the statutory scheme is confirmed by Commerce's own regulations. Commerce conducts administrative reviews of two types of foreign parties: (i) producers; and (ii) exporters. The agency's regulations make clear that a requesting party may ask Commerce to conduct a review of "specified individual exporters or producers covered by an order." 19 C.F.R. § 351.213(b)(1) (2005); *see also* 19 U.S.C. § 1673b(d)(1)(A). In other words, under the statutory and regulatory scheme, when the agency conducts a review of a foreign party, it may review that party in its capacity as an *exporter*, in which case all entries exported by that party are covered by the determination in the review; in its capacity as a *producer*, in which case all entries produced by that party are covered by the determination in the review; or in *both* of these capacities, in which case all entries either produced or exported by that party are covered by the

determination in the review. *See* 19 U.S.C. § 1677(28) (defining "exporter or producer" to mean "the exporter of the subject merchandise, the producer of the subject merchandise, or *both where appropriate*") (emphasis added).

Thus, under the statutory scheme, when Commerce conducts a review of a foreign party in its capacity as a *producer* pursuant to a request for such a review, all "entries of merchandise" produced by that company are "covered by the determination" in the annual review such that the determination "shall be the basis for the assessment of" antidumping duties on entries of the merchandise pursuant to 19 U.S.C. § 1675(a)(2)(C).

In the vast majority of cases, Commerce does review foreign parties in their capacities as producers, either exclusively or in addition to reviewing them in their capacity as exporters. In this case, for example, petitioner Micron requested that Commerce conduct an administrative review of "the subject merchandise manufactured and/or sold by" LG; i.e., Micron in accordance with 19 C.F.R. § 351.213(b)(1) (2005) requested a review of LG in both its capacity as a producer and its capacity as an exporter. Therefore, all imported subject merchandise *produced* by LG, including that purchased by Renesas from a reseller, was covered by Commerce's determination in the review and should have been assessed antidumping duties based on the review results.

In sum, the Federal Circuit's interpretation of 19 U.S.C. § 1675(a)(2)(C) is erroneous because it

ignores the statutory context. That context makes clear that the scope of administrative review is determined by the scope of initial request. Where, as here, an initial request for review applies to goods manufactured by a producer, the results of that review apply to all goods manufactured by that producer, even if the importer purchases the goods from a third-party reseller rather than directly from the producer.

B. The Federal Circuit's Construction Upholds Commerce's Inconsistent Interpretation and Enforcement of 19 U.S.C. § 1675(a)(2)(C)

Commerce's own interpretation and enforcement of Section 1675(a)(2)(C) with respect to *prospective cash deposits of estimated duties* is inconsistent with its interpretation and enforcement of the same statute with respect to the *retrospective assessment of actual duties*. Section 1675(a)(2)(C) provides that the results of an administrative review apply "for the assessment of ... antidumping duties on entries of merchandise covered by the determination *and for deposits of estimated duties*." 19 U.S.C. § 1675(a)(2)(C) (emphasis added). Under Commerce regulations, the results of an administrative review become the new cash deposit rate for estimated duties on later entries of merchandise manufactured by that producer, regardless of whether the goods are exported to the United States by the producer or by a third-party reseller of goods manufactured by that producer, unless Commerce has previously calculated an individual cash deposit rate for that reseller. *See* 19 C.F.R. § 351.107(b)(2) (2005) ("In the

case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise . . . the Secretary will apply the cash deposit rate established for the producer.").[8]

Commerce's treatment of importers that purchase from resellers with respect to cash deposits of estimated duties is entirely consistent with 19 U.S.C. § 1675(a)(2)(C). The Federal Circuit decision, however, approved Commerce's disparate treatment of importers that purchase from resellers with respect to the assessment of past duties, even though the statute mandates that results of an administrative review must apply equally to estimated cash deposits as well as the assessment of duties. Such incongruous treatment under the same statute further punctuates the error in the Federal Circuit's construction of 19 U.S.C. § 1675(a)(2)(C).

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[8] Although Commerce determines estimated cash deposit duties for a producer's products without regard to whether the importer purchased directly from the producer or a reseller, under any later administrative review an importer that purchases from a reseller will, in the absence of a reseller specific review, be assessed actual duties on the basis of the "all others" cash deposit rate established after the initial investigation. Thus, Commerce's correct administration of 19 U.S.C. § 1675(a)(2)(C) with respect to *prospective cash deposits* is ultimately cancelled out by its erroneous administration of the same statute with regard to *retrospective assessments of actual duties.*

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

App. 1

RENESAS TECHNOLOGY AMERICA, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant,

and

MICRON TECHNOLOGY, INC.,
Defendant-Appellant.

04-1473, -1474

United States Court of Appeals
for the Federal Circuit

2005 U.S. App. LEXIS 13278

July 1, 2005

Before NEWMAN, MAYER, and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

The government appeals the final decision of the United States Court of International Trade granting summary judgment to Renesas Technology America, Inc. ("the appellee"). See Renesas Tech. Am., Inc. v. United States, No. 00-00114 (Ct. Int'l Trade Aug. 18, 2003) ("Renesas").

The relevant facts and issues raised by the parties in this case are materially indistinguishable from those in Nissei Sangyo Am., Ltd. v. United States, No. 04-1469, -1492 (Fed. Cir. July 1, 2005) ("Nissei Sangyo"). As discussed in Nissei Sangyo, this court's decisions in Consolidated Bearings Co. v. United States, 348 F.3d 997 (Fed. Cir. 2003) ("Consolidated Bearings I") and Consolidated Bearings Co. v. United States, No. 04-1556 (Fed. Cir. June 21, 2005) ("Consolidated Bearings II") foreclose the appellee's arguments. In those cases, this court held that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that the Department of Commerce ("Commerce") has consistently liquidated unreviewed entries at the cash deposit rate. Therefore the instructions from Commerce in this case ordering Customs to liquidate appellee's entries at the cash deposit rate were in accordance with law and were not arbitrary, capricious, or an abuse of discretion.

In accordance with the decisions in Consolidated Bearings I, Consolidated Bearings II, and Nissei Sangyo, we must reverse the decision of the Court of International Trade.

App. 3

RENESAS TECHNOLOGY AMERICA, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant,

and

MICRON TECHNOLOGY, INC.,
Defendant-Appellant.

04-1473, -1474

United States Court of Appeals
for the Federal Circuit

Judgment

ON APPEAL from the UNITED STATES COURT OF INTERNATIONAL TRADE

in CASE NO(S). 00-00114

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

REVERSE

ENTERED BY ORDER OF THE COURT

DATED Jul 1 2005 Jan Horbaly, Clerk

App. 4

Slip Op. 03-106

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

RENESAS TECHNOLOGY AMERICA, INC.,
Plaintiff,

v.

UNITED STATES,

Defendant,

and

MICRON TECHNOLOGY, INC.,

Defendant-Intervenor.

Court No. 00-00114

2003 Ct. Intl. Trade LEXIS 105

[Plaintiff's motion for summary judgment is granted; liquidation instructions issued by U.S. Department of Commerce are remanded.]

Dated: August 18, 2003

McDermott, Will & Emery (David J. Levine) for plaintiff Renesas Technology America, Inc.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice;

Patrick V. Gallagher, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant United States.

Hale & Dorr, LLP (Michael D. Esch) for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, Senior Judge: Plaintiff Renesas Technology America, Inc.[1] ("Renesas"), moves for summary judgment upon the agency record pursuant to USCIT R. 56.1, contesting the issuance of liquidation instructions contained in message numbers 9305211 and 9305212 ("Liquidation Instructions") by the U.S. Department of Commerce ("Commerce") to the U.S. Customs Service[2] ("Customs"), dated November 1, 1999. The Liquidation Instructions ordered the liquidation of Renesas's entries of Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") at the manufacturer's cash deposit rate

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[1] Plaintiff, formerly known as Hitachi Semiconductor (America), Inc., has changed its name to Renesas Technology America, Inc. See Certificate of Amendment to the Certificate of Incorporation of Hitachi Semiconductor (America) Inc. (Mar. 31, 2003).

[2] It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107-296, 116 Stat. 2135, 2308-09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108-32, p. 4 (Feb. 4, 2003).

rather than the rates determined for the manufacturer during the administrative reviews of May 6, 1996 and January 7, 1997.

For the reasons that follow, the Court holds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i).

I. BACKGROUND

Renesas is an importer of Korean DRAMs manufactured by LG Semicon Co., Ltd. ("LG Semicon"), formerly Goldstar Electron Co., Ltd. ("Goldstar"). Renesas purchased DRAMs manufactured by Goldstar from a reseller, and entered numerous shipments in 1993, 1994, and 1995. At the time of entry, an antidumping duty order was in effect covering DRAMs imported by Renesas. See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, Antidumping Duty Order and Amended Final Determination, 58 Fed. Reg. 27,520 (May 10, 1993). Pursuant to the antidumping order of May 10, 1993, Commerce issued suspension instructions on May 25, 1993 ordering Customs to require Renesas to post cash deposits of estimated antidumping duties applicable to the merchandise at issue, and such deposit was made. These suspension instructions provided deposit rates for all entries at the manufacturer's rate, and did not provide separate rates for importers or resellers. Id. at 27,522.

On June 15, 1994, Commerce initiated an administrative review of imports of DRAMs manufactured by Goldstar and Hyundai Electronics Co., Ltd. ("Hyundai"), another Korean manufacturer of DRAMs, that were imported into the United States from October 29, 1992 through April 30, 1994 ("POR 1"). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). Upon conclusion of the administrative review, Commerce determined that the dumping margin for Goldstar was 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996).

On June 15, 1995, Commerce initiated a second administrative review of imports of DRAMs manufactured by LG Semicon and Hyundai that were imported into the United States from May 1, 1994 through April 30, 1995 ("POR 2"). Initiation of Antidumping and Countervailing Duty Administrative Review, 60 Fed. Reg. 31,447 (June 15, 1995). Commerce determined that the dumping margin for LG Semicon was de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997).

Subsequently, Defendant-Intervenor Micron Technology, Inc. ("Micron") filed an action in opposition to the rates determined in POR 1 and POR 2 for LG Semicon. The Court of International

Trade and the Court of Appeals for the Federal Circuit sustained the results of the first and second administrative reviews for LG Semicon DRAMs. Micron Technology v. United States, 23 CIT 55, 44 F. Supp. 2d 216 (1999); Micron Technology v. United States, 23 CIT 208, 40 F. Supp. 2d 481 (1999).

In addition, prior to the conclusion of the Micron cases, Commerce issued its final results for a third administrative review period covering LG Semicon and Hyundai DRAMs that were imported from May 1, 1995 though April 30, 1996 ("POR 3"). During POR 3, Commerce issued instructions to Customs to liquidate entries of LG Semicon and Hyundai DRAMs during that period irrespective of the identity of the importer.

Upon conclusion of the Micron cases, Commerce instructed Customs to assess antidumping duties on Renesas's imports of LG Semicon DRAMs at the manufacturer's cash deposit rate upon entry. Commerce did not instruct Customs to liquidate Renesas's entries at the rates determined for POR 1 or POR 2.

Renesas contests the Liquidation Instructions and moves for summary judgment on the grounds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and were issued without advance notice to Renesas. Commerce argues that the Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Alternatively, Commerce argues that Renesas has not exhausted its administrative

remedies or that otherwise the Liquidation Instructions are rational and in accordance with law.

II. STANDARD OF REVIEW

Assuming that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), 28 U.S.C. § 2640(e) (1994) governs this case. Section 2640(e) establishes the standard of review in an action brought under 28 U.S.C. § 1581(i), providing that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter provided in section 706 of title 5." Accordingly, the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

III. DISCUSSION

A. The Court has residual jurisdiction under § 1581(i).

As a threshold matter, Commerce argues that the Court lacks residual jurisdiction pursuant to 28 U.S.C. § 1581(i). Commerce claims that Renesas had an alternative remedy under § 1581(c). It claims that Renesas could have filed an independent request for an administrative review and/or participated in POR 1 and POR 2 under § 1581(c). Commerce argues that this alternative remedy renders § 1581(i) residual jurisdiction unavailable.

Renesas argues that Commerce's prior practice dictated that the rates determined during the administrative review periods applied to all importers of the subject merchandise. This was the governing practice irrespective of whether the importer filed an individual request for an administrative review. In support of this argument, Renesas points to Consolidated Bearings Company v. United States, 25 CIT __, 166 F. Supp. 2d 580 (2001) and ABC International Traders, Inc. v. United States, 19 CIT 787 (1995). Additionally, Renesas points to two notices recently published by Commerce. See "Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties," 68 Fed. Reg. 23,954 (May 6, 2003) ("Assessment Policy Notice"); "Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to Notice of Opportunity To Request Administrative Review," 68 Fed. Reg. 26,288 (May 15, 2003) ("Review Amendment Notice"). Renesas argues that these notices constitute Commerce's admission that the Liquidation Instructions constituted a change from its past practice without notice and that, prior to the issuance of the Liquidation Instructions, entries for a given importer such as Renesas were liquidated at the rate determined for the producer of the subject merchandise in the administrative review.

The merits of this action and the resolution of the jurisdictional issue are intertwined. Pursuant to § 1581(i), the Court does not possess jurisdiction to decide issues relating to antidumping law if review is specifically provided for by other subparagraphs of

§ 1581. "[I]t is well established that the residual jurisdiction of the court under [sub]section 1581(i) 'may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.'" Consolidated, 25 CIT at __, 166 F. Supp. 2d at 583 (quoting Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998) (internal citation omitted) (emphasis in original)).

In Consolidated, Commerce issued liquidation instructions that required Customs to assess antidumping duties on the plaintiff-importer's entries of the subject merchandise at the cash deposit rates in effect at the time of entry instead of at the weighted-average rates determined for the subject merchandise in the amended final results of the administrative review. The plaintiff-importer contested the instructions on the grounds that they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and requested that Customs apply the liquidation rates determined in the administrative review. The court found that it "[was] appropriate to exercise residual jurisdiction because jurisdiction under other subsections of section 1581 [was] not available." Id. at 583. The court explained that:

> Commerce's liquidation instructions also are not reviewable under subsection 1581(c) because they were not part of the Final Results or the Amended Final Results. Rather, such

> instructions are issued after relevant final determinations are published and, accordingly, it was impossible for [the importer] to contest the instructions as required under 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994). . . [F]inally, none of the other subsections of section 1581 of Title 19 provides a viable basis for jurisdiction. Id.

In the instant case, Commerce did not publish the Liquidation Instructions until November 1, 1999. This was after the final results of POR 1 and POR 2 were published on May 6, 1996 (61 Fed. Reg. 20,216) and January 7, 1997 (62 Fed. Reg. 965), respectively. The Liquidation Instructions changed Commerce's prior instructions in message number 7128114 issued for POR 2, dated May 8, 1997. Those instructions ordered Customs to liquidate "all entries covered by the [Order] at the rates established in the administrative reviews for the three Korean manufacturers: Goldstar, Hyundai, and Samsung." In addition, the reasoning set forth in ABC dictated that in the absence of another or "all other" rate, all importers of the subject merchandise were covered by the review. Thus, it was reasonable for Renesas to assume that its entries would be liquidated at the administrative review rates and that it need not file an independent request for an administrative review pursuant to § 1581(c). Renesas, as an importer of DRAMs covered in POR 1 and POR 2, should have been able to rely on such assessment without apprehension that Commerce would change its mind later and change the properly

assessed rates. Consolidated, 25 CIT at __, 166 F. Supp. 2d at 593.

Likewise, in ABC, the court held that the manufacturers' rates determined in the administrative review applied to the plaintiff-reseller since there was no other rate that could have applied:

> Absent an applicable reseller, or even an 'all other' rate, [the plaintiff] should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist. ABC, 19 CIT at 790.

Similarly, at the time of entry, a § 1581(c) request by Renesas was wholly unnecessary, thereby failing to provide an adequate remedy under the reasoning set forth in ABC. Finally, Commerce does not present the argument that any other subsection of § 1581 provided Renesas with an adequate remedy, and the Court finds no other subsection of § 1581 applicable. Accordingly, the Court exercises

jurisdiction over the matter under 28 U.S.C. § 1581(i).

B. The exhaustion doctrine does not dictate dismissal of Renesas's claim.

Commerce argues that the exhaustion doctrine applies since Commerce never had an opportunity to properly consider Renesas's argument. This was allegedly because Renesas never presented the issue to Commerce in the appropriate administrative proceeding. Renesas asserts that the exhaustion doctrine does not apply to the instant case because its circumstances qualify it as an exception. Specifically, Renesas maintains that it had no reason to expect that Commerce would refuse to apply the manufacturer's rates to its entries. Alternatively, Renesas claims that the issue at hand is of a purely legal nature that requires no further agency involvement.

The exhaustion doctrine requires that a party present its claims to the relevant administrative agency for the agency's consideration before bringing these claims to the Court. Consolidated, 25 CIT at __, 166 F. Supp. 2d at 586 (citing Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946)). However, there is no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. Id. (citing Alhambra Foundry Co. v. United States, 12 CIT 343, 346-47, 685 F. Supp. 1252, 1255-56 (1988)). Thus, the Court has the discretion to determine proper exceptions to the doctrine of exhaustion. Id.

Exceptions to the requirement of exhaustion have been found where requiring it (1) would be futile or (2) would be "inequitable and an insistence of a useless formality." See Rhone Poulenc, S.A. v. United States, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984); United States Canes Sugar Refiners' Ass'n v. Block, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982). A second exception exists where the "question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question." See id.

The circumstances in the instant case fall under the "pure question of law" exception to the exhaustion doctrine. In Consolidated, the court set out the requirements for the "pure question of law" exception as follows: (a) plaintiff's argument is new; (b) this argument is of a purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce time and resources. See Consolidated, 25 CIT at __, 166 F. Supp. 2d at 587. This instant case presents a pure question of law that fits squarely within this exception for the reasons that follow: (a) Renesas's presents a new argument to the Court; (b) the inquiry involves a question of law — namely, whether Commerce's liquidation instructions are arbitrary and capricious; (c) the inquiry does not require any special expertise by Commerce and/or the development of a special factual record either before or after the Court's consideration of the issue;

and (d) for the reason mentioned in part (c), judicial inquiry here will not create undue delay or unnecessary expenditure. Id.

C. The Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Renesas argues that the Liquidation Instructions are arbitrary, capricious, and contrary to law, and were issued without advance notice to Renesas. Commerce contends that the Liquidation Instructions are rational and in accordance with law, and were issued within the scope of its authority.

Commerce argues that since Renesas did not argue that LG Semicon knew its goods were destined for export to the United States, Renesas is not covered by the administrative reviews. In support of its argument, Commerce refers to the "knowledge test" upheld in NSK Ltd. v. United States, 190 F. 3d 1321, 1334 (Fed. Cir. 1999). Commerce's argument is flawed. The knowledge test that was upheld in NSK only applies to the producer, LG Semicon, and speaks nothing of the application of the administrative reviews to the importer, Renesas. See generally id. The knowledge test as it stands in NSK is inapplicable to this case. Therefore, Commerce asks the Court to hold that the knowledge test stands for the proposition that the importer is only covered by an administrative review if the producer knew that its goods were destined for export to the United States. See Defendant's Response in Opposition to Plaintiff's Motion for Judgment upon

the Agency Record, 20. However, Commerce has not spoken of this application of the knowledge test in the past. Additionally, Commerce failed to speak of this application of the knowledge test in the liquidation instructions issued in POR 1 and POR 2 and, thereby, issued the contested instructions without explaining the basis for its action. Therefore, this application of the knowledge test was unwarranted. See Consolidated, 25 CIT at __, __, 166 F. Supp. 2d at 589, 590 ("If the Department of Commerce fails to explain the basis for its liquidation instructions, Commerce's action is arbitrary and capricious.").

In Consolidated, the court found arbitrary and capricious liquidation instructions that changed Commerce's previous practice of liquidating at the rate determined in the administrative review but instead liquidated at the cash deposit rate. The court found the instructions arbitrary, in part, because they were not clear to the plaintiff and were completely contrary to instructions that were issued previously. The court saw the following problems with Commerce's action:

> Considering that on September 9, 1997, Commerce already instructed Customs to liquidate certain entries subject to the review at certain rates, it is entirely unclear to this Court why, almost a year later, Commerce felt compelled to issue the liquidation instructions at issue if, as Commerce now contends, the conclusions contained in these liquidation instructions were already

> self-evident from the very same record and from the previously issued September 9, 1997, instructions. . . . Such action by Commerce shows that Commerce contemplated a scenario under which certain entries of the [subject merchandise], including [the merchandise] manufactured by the [plaintiff-importer] could have been liquidated at one rate prior to the issuance of the contested liquidation instructions and an entirely different rate after the issuance of [said] instructions. Id. at 592.

The Court finds the same problem with the Liquidation Instructions in the instant case. Commerce issued new instructions on November 1, 1999 and, thereby, changed its past practice of liquidating at "the rate established for the most recent period for the manufacturer of the merchandise." 61 Fed. Reg. 20,216, 20,222. The Liquidation Instructions were issued without notice to Renesas, which had no reason to know that Commerce would change the instructions and require it to request a separate and independent administrative review. Commerce's past practice and the reasoning set forth in ABC and Consolidated gave Renesas a reasonable expectation that their entries were covered by the rates established in POR 1 and POR 2, and therefore that they would not need to file an independent request for an administrative review. The Assessment Policy Notice and Review Amendment Notice appear to acknowledge

Commerce's past liquidation practice. See 68 Fed. Reg. 23,954; 68 Fed. Reg. 26,288. Renesas had no reason to know that their entries were not covered by the rates determined in POR 1 and POR 2. Commerce failed to explain the basis for the Liquidation Instructions at issue and failed to provide Renesas with notice of the change. See Consolidated, 25 CIT at __, 166 F. Supp. 2d at 590. Therefore, the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

IV. CONCLUSION

For the aforementioned reasons, the Court finds that jurisdiction attaches under 28 U.S.C. § 1581(i) and that Renesas's claim is not precluded by the exhaustion doctrine. In addition, for the reasons stated herein, the Court finds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to this opinion, this case is remanded to Commerce to (1) rescind the Liquidation Instructions and (2) issue new instructions ordering Customs to liquidate and/or re-liquidate Renesas's entries at the antidumping rates determined for LG Semicon during POR 1 and POR 2.

NISSEI SANGYO AMERICA, LTD.
(now Hitachi High Technologies America, Inc.),
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant,

and

MICRON TECHNOLOGY, INC.,
Defendant-Appellant.

04-1469, -1492

United States Court of Appeals
for the Federal Circuit

2005 U.S. App. LEXIS 13277

July 1, 2005

Before NEWMAN, MAYER, and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

The government appeals the final decision of the United States Court of International Trade granting summary judgment to Nissei Sangyo America, Ltd. ("the appellee") by finding that the instructions to liquidate appellee's entries at the cash deposit rate were arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law. See Nissei Sangyo Am., Ltd. v. United States, No. 00-00113 (Ct. Int'l Trade Aug. 18, 2003) ("Nissei Sangyo"). The Court of International Trade held that the Department of Commerce ("Commerce") had deviated from its past practice of liquidating entries at the manufacturer's review rate when it ordered liquidation of appellee's entries at the cash deposit rate. Because the arguments in favor of the appellee are foreclosed by the decisions in Consolidated Bearings Co. v. United States, 348 F.3d 997 (Fed. Cir. 2003) ("Consolidated Bearings I"), and Consolidated Bearings Co. v. United States, No. 04-1556 (Fed. Cir. June 21, 2005) ("Consolidated Bearings II"), which collectively held that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that Commerce in the past consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate, we reverse the decision of the Court of International Trade.

I

The appellee is an importer of Dynamic Random Access Memory semiconductors of one megabit or more ("DRAMs"). The appellee purchased its merchandise for import from a reseller not associated with the manufacturer of the DRAMs. The manufacturer of the DRAMs imported by the appellee was LG Semicon Co., Ltd. ("LG"), formerly Goldstar Electron Co., Ltd., which was under review in antidumping proceedings. An antidumping duty order was in effect when the appellee imported the

subject DRAMs. See Antidumping Duty Order and Amended Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, 58 Fed. Reg. 27,520 (May 10, 1993). Upon entry, the appellee was required to post cash deposits at the manufacturer's rate as estimated antidumping duties.

Administrative review of DRAMs made by multiple manufacturers that were imported into the United States from October 29, 1992 to April 30, 1994 ("POR 1") was initiated. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). In this review, the dumping margin for LG was calculated to be 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996). The appellee did not participate in this administrative review.

Beginning on June 15, 1995, a second period of review ("POR 2") from May 1, 1994 to April 30, 1995, was initiated. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 60 Fed. Reg. 31,447 (June 15, 1995). For this period, the dumping margin for LG was determined to be de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968

(Jan. 7, 1997). The appellee also did not participate in this review.

Micron Technology, Inc. ("Micron"), a domestic producer of DRAMs, sued in opposition to the rates determined for LG in POR 1 and POR 2. The Court of International Trade and this court sustained the rates determined for LG. See Micron Tech., Inc. v. United States, 243 F.3d 1301 (Fed. Cir. 2001); Micron Tech., Inc. v. United States, 44 F. Supp. 2d 216 (Ct. Int'l Trade 1999); Micron Tech., Inc. v. United States, 40 F. Supp. 2d 481 (Ct. Int'l Trade 1999). Commerce subsequently issued liquidation instructions which lifted suspension of the POR 1 and POR 2 entries and directed Customs to liquidate appellee's entries at the cash deposit rate. Appellee's entries were not given the benefit of the de minimis dumping rate determined for LG in the administrative review.

The appellee appealed to the Court of International Trade, which found that the liquidation instructions issued by Commerce were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and entered summary judgment in favor of the appellee. When it issued its opinion, the Court of International Trade did not have the benefit of this court's decision in either Consolidated Bearings I or Consolidated Bearings II.

The government appeals the decision of the Court of International Trade arguing that Commerce had a consistent past practice of liquidating

unreviewed resellers at the cash deposit rate. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2000).

II

A decision of the Court of International Trade reviewing an antidumping decision by Commerce is reviewed "anew" by this court by reapplying the same standard of review applied by the Court of International Trade when it reviewed the decision by Commerce. Consolidated Bearings I, 348 F.3d at 1004; Mitsubishi Heavy Indus., Ltd. v. United States, 275 F.3d 1056, 1060 (Fed. Cir. 2001). Therefore, Commerce's liquidation instructions should be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A) (2000); Consolidated Bearings I, 348 F.3d at 1004.

III

This case presents the same issue as Consolidated Bearings II, which issued from this court on June 21, 2005. In the present case, the Court of International Trade found that the liquidation instructions for appellee's entries were an arbitrary deviation from past practice because the instructions suffered the same problems as those in Consolidated Bearings Co. v. United States, 166 F. Supp. 2d 580 (Ct. Int'l Trade 2001). See Nissei Sangyo, slip op. at 15. We have since reversed Consolidated Bearings, 166 F. Supp. 2d 580, in Consolidated Bearings I, and to the extent that the

Court of International Trade decision in this case relies on its opinion in that case, those arguments are no longer sound. Because a "reseller" rate determination was never requested by these importers or their suppliers, Consolidated Bearings I directs that the appellee does not have a statutory right to liquidation at the manufacturer's review rate. See 348 F.3d at 1006.

What remains is whether Commerce deviated arbitrarily from a past consistent practice when it liquidated appellee's unreviewed entries at the cash deposit rate. This court has recently addressed this issue and held that Commerce "has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." Consolidated Bearings II, slip op. at 11. Consolidated Bearings II directly applies to the facts of appellee's case. In particular, we note that the evidence relied upon by both Consolidated Bearings and Commerce to support their positions in the Consolidated Bearings II appeal is substantially the same as that offered by the respective parties in the present case. Therefore, for the reasons set forth in Consolidated Bearings II, the decision of the Court of International Trade is reversed.

App. 26

CONSOLIDATED BEARINGS COMPANY,
Plaintiff–Cross Appellant,

v.

UNITED STATES,
Defendant–Appellant.

Nos. 02–1634, 02–1635

UNITED STATES COURT OF APPEALS, FEDERAL CIRCUIT

348 F.3d 997

Oct. 29, 2003
Rehearing Denied Dec. 30, 2003

Christopher R. Wall, Pillsbury Winthrop LLP, of Washington, DC, argued for plaintiff- cross appellant.

David Silverbrand, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. On the brief was David M. Cohen, Director. Of counsel were John D. McInerney, Patrick V. Gallagher, and Berniece A. Browne, Attorneys, United States Department of Commerce, of Washington, DC.

Michael D. Esch, Hale and Dorr LLP, of Washington, DC, for amicus curiae Micron Technology, Inc. With him on the brief was Cris R. Revaz.

David J. Levine, McDermott, Will & Emery, of Washington, DC for amicus curiae Hitachi Semiconductor (America) Inc.; and Michael E. Roll, Katten Muchen Zavis Rosenman, of Los Angeles, California, for amicus curiae Hitachi High Technologies America, Inc.

Before CLEVENGER, RADER, and PROST, Circuit Judges.

RADER, Circuit Judge.

When the United States Court of International Trade reached a final decision in a complex case involving antidumping liquidation procedures for imports, both Defendant–Appellant United States and Plaintiff–Cross Appellant Consolidated Bearings Company (Consolidated) appealed. *Consolidated Bearings Co. v. United States,* 02–72 (CIT July 24, 2002) (*Consolidated IV*). After finding it possessed jurisdiction, *Consolidated Bearings Company v. United States,* 166 F.Supp.2d 580 (CIT 2001) (*Consolidated I*), the trial court's decision in *Consolidated IV* affirmed the United States Department of Commerce's (Commerce) April 1, 2002 *Final Results of Redetermination Pursuant to Court Remand* (*Remand II*).[1]

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[1] In *Consolidated I,* the United States Court of International Trade remanded the case to Commerce, which resulted in Commerce's November 29, 2001 *Final Results of Redetermination Pursuant to Court Remand* (*Remand I*). The Court of International Trade reviewed *Remand I* and issued a decision in *Consolidated Bearings*

(continued...)

Because no other subsection of 28 U.S.C. § 1581 was or could have been a basis for jurisdiction in this case, trial court was correct in finding jurisdiction under section 1581(i). In addition, this court agrees with the trial court's holding that the exhaustion doctrine does not apply in this case, but does not agree that the "pure question of law" exception applies. Finally, because the Court of International Trade erred in interpreting 19 U.S.C. § 1675(a)(2)(C) (2000), this court vacates the judgment below and remands for further proceedings consistent with this opinion.

I.

Commerce issues antidumping duty orders for imported merchandise that is sold in the United States below its fair value and materially injures or threatens to injure a domestic industry. *See* 19 U.S.C. § 1673e (2000); 19 U.S.C. § 1673d (2000). These antidumping duties reflect the difference

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Company v. United States, 182 F.Supp.2d 1380 (CIT 2002) (*Consolidated II*), which again remanded the case to Commerce resulting in *Remand II.* The Court of International Trade addressed Commerce's action in *Remand II* in its third decision, *Consolidated Bearings Company v. United States,* 02–62 (CIT July 9, 2002) (*Consolidated III*). Commerce filed a motion for clarification of that decision on July 18, 2002, which lead to the Court of International Trade's decision in *Consolidated IV.*

between the foreign exporter's sales price and the domestic price of the merchandise. *See* 19 U.S.C. § 673e(a)(1) (2000). Upon entry of merchandise covered by an antidumping order, an importer must make a cash deposit of estimated duties (cash deposit rate). *See* 19 U.S.C. § 1673e(a)(3) (2000).

Under Commerce's accounting system, the actual liquidation of entries subject to an antidumping order may occur years after importation. Before final liquidation, any interested party may request an administrative review of the antidumping duty order. *See* 19 U.S.C. § 1675 (2000). The final results of such a review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C) (2000). Without a request for administrative review, Commerce liquidates the merchandise at the cash deposit rates (i.e., the deposit rates at the time of entry). *See* 19 C.F.R. § 351.212(c)(i) (2003).

In 1989, Commerce issued antidumping duty orders on antifriction bearings (AFBs) from Germany. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (May 15, 1989) (the 1989 orders). Between 1989 and 1997, Consolidated purchased and imported AFBs manufactured in Germany by FAG Kugelfischer Georg Schaefer KgaA (FAG). Consolidated did not purchase the AFBs directly from FAG. Rather,

Consolidated imported the AFBs from an unrelated foreign reseller. Upon importation of the AFBs under the 1989 orders, Consolidated paid cash deposits of estimated duties based on the rates assigned to the manufacturer FAG.

In 1990, various domestic importers of AFBs manufactured by FAG requested an administrative review. Commerce initiated the review on June 11, 1990 and published its final results on July 11, 1991.[2] Consolidated did not request or participate in the administrative review. After the Court of International Trade adjudicated some challenges to those final results, Commerce issued its amended final results (the final results).[3] Under these final results, each participating importer of FAG-manufactured AFBs received a new specific duty rate. Information concerning Consolidated's imports and the reseller that exports to Consolidated was not

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[2] See Antifriction Bearings (Other Than Tapered Rolled Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 55 Fed.Reg. 23575 (Dep't Commerce June 11, 1990) (initiation of antidumping admin. review); Antifriction Bearings (Other Than Tapered Rolled Bearings) and Parts Thereof From the Federal Republic of Germany, 56 Fed.Reg. 31692 (Dep't Commerce July 11, 1991) (final results).

[3] See Antifriction Bearings (Other Than Tapered Rolled Bearings) and Parts Thereof From the Federal Republic of Germany, 62 Fed.Reg. 32755 (Dep't Commerce June 17, 1997) (amended final results).

presented to Commerce in the administrative review.

In September 1997, the United States Customs Service (Customs) received liquidation instructions from Commerce. These instructions implemented the final results for the liquidation of AFB entries for the participating importers (the 1997 instructions). Because Consolidated was not a party to the administrative review, the final results did not contain a new antidumping rate specifically for Consolidated or the reseller that exports to Consolidated. On August 4, 1998, Customs again implemented liquidation instructions from Commerce. These 1998 instructions directed Customs to liquidate all entries of AFBs from Germany that had not been liquidated by the 1997 instructions. Under the 1998 instructions, Customs liquidated the remaining merchandise at the cash deposit rate in effect at the time of entry. These 1998 instructions required liquidation of Consolidated's entries at the time-of-entry cash deposit rates, which were much higher than the rates for the participating importers under the final results.

Consequently, Consolidated brought this action to challenge the 1998 instructions and compel Commerce to apply the antidumping rates in the final results to Consolidated's entries of AFBs from Germany. Specifically, Consolidated contends that Commerce should apply to Consolidated's entries a rate equal to a weighted-average of the rates established in the final results for FAG-manufactured AFBs. In *Consolidated I,* the Court of

International Trade found jurisdiction, found no violation of the exhaustion doctrine, entered judgment on the merits in favor of Consolidated, and remanded the case for Commerce to reassess the antidumping duty. 166 F.Supp.2d at 582–93. The Court of International Trade ultimately affirmed Commerce's actions in *Remand II*. *See Consolidated VI*, 02–72 at 4.

The Court of International Trade invalidated the 1998 instructions as an unlawful correction or modification of the 1997 instructions. *See Consolidated II*, 182 F.Supp.2d at 1382–83. Commerce expressed its opinion that the trial court was in error. Nevertheless, to comply with the remand order, Commerce annulled the 1998 instructions and used the *ad valorem* rates in the 1997 instructions (from the final results) for liquidation of Consolidated's FAG-manufactured AFB imports. In this appeal, Commerce challenges the trial court's judgment on the merits in *Consolidated I*, and Consolidated challenges the trial court's affirmance of Commerce's second remand determination in *Remand II*. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2000).

II.

Subject Matter Jurisdiction

This court reviews the trial court's subject matter jurisdiction ruling as a legal determination without deference. *See JCM, Ltd. v. United States*,

210 F.3d 1357, 1359 (Fed.Cir.2000). Consolidated sought jurisdiction under title 28's residual jurisdiction provision:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court

> of International Trade under section 516A(a) of the Tariff Act of 1930.

28 U.S.C. § 1581(i) (2000). Section 1581(i) (subsection (i)) supplies jurisdiction only for instances when no other subsection of that section "is or could have been available," unless the other subsection provided no more than a manifestly inadequate remedy. *Norcal/Crosetti Foods, Inc. v. United States,* 963 F.2d 356, 359 (Fed.Cir.1992) (quoting *Miller & Co. v. United States,* 824 F.2d 961, 963 (Fed. Cir.1987), *cert. denied,* 484 U.S. 1041, 108 S.Ct. 773, 98 L.Ed.2d 859 (1988)).

Commerce contends that 28 U.S.C. § 1581(c) (subsection (c)) could have been available to establish jurisdiction in this case if Consolidated had participated in the administrative review that produced the final results. Subsection (c) grants the Court of International Trade jurisdiction over actions brought under section 516A of the Tariff Act of 1930, which includes challenges to the final results of an administrative review by a participant in that review. *See* 28 U.S.C. § 1581(c) (2000); 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). Subsection (i) specifically states that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930." 28 U.S.C. § 1581(i) (2000). According to Commerce, Consolidated cannot maintain this action under subsection (i) because it could have brought the same action under subsection (c) if it had joined the

administrative review process. In other words, Commerce asks this court to bar Consolidated from jurisdiction under subsection (i) because it did not participate in the administrative review.

Consolidated, however, did not bring this action to challenge the final results of the administrative review. If that were the case, Commerce's position might have more merit. Consolidated does not object to the final results. Rather Consolidated seeks application of those final results to its entries of AFBs manufactured by FAG. This case involves a challenge to the 1998 instructions, which is not an action defined under section 516A of the Tariff Act. Stated otherwise, in this action, Consolidated challenges the 1998 instructions as a violation of 19 U.S.C. § 1675(a)(2)(C) and as a departure from Commerce's well-established past practice of liquidation. Because Consolidated is not challenging the final results, subsection (c) is not and could not have been a source of jurisdiction for this case.

In addition to finding this case outside the jurisdictional grants in subsection (c), this court finds this case squarely within the provisions of subsection (i). Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews. Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the "administration and enforcement" of those final results. Thus, Consolidated challenges the manner in which Commerce administered the final results.

Section 1581(i)(4) grants jurisdiction to such an action.

Moreover, liquidation instructions direct Customs to impose antidumping duties to protect domestic markets. As a result, an action against those instructions also arises as a challenge to "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2) (2000). This court, therefore, concludes that the trial court correctly asserted jurisdiction under 28 U.S.C. § 1581(i)(2) and (4).

Exhaustion of Administrative Remedies

Proper subject matter jurisdiction does not finish the jurisdictional inquiry. In the Court of International Trade, a plaintiff must also show that it exhausted its administrative remedies, or that it qualifies for an exception to the exhaustion doctrine. *See* 28 U.S.C. § 2637(d) (2000) ("the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies"). While enforcing exhaustion requirements as jurisdictional prerequisites, the Court of International Trade also enjoys discretion to identify circumstances where exhaustion of administrative remedies does not apply. *See Cemex, S.A. v. United States,* 133 F.3d 897, 905 (Fed.Cir.1998).

Generally, "[t]he doctrine of exhaustion of administrative remedies provides 'that no one is entitled to judicial relief for a supposed or

threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart v. United States,* 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50–51, 58 S.Ct. 459, 82 L.Ed. 638 (1938)). If a party does not exhaust available administrative remedies, "judicial review of Commerce's actions is inappropriate." *Sharp Corp. v. United States,* 837 F.2d 1058, 1062 (Fed.Cir.1988). Over the years, the Court of International Trade has identified various exceptions to the exhaustion requirement. For instance, in the proceedings below, the trial court identified various exceptions to the exhaustion doctrine, including the "futility" exception and the "pure question of law" exception. *See Consolidated I,* 166 F.Supp.2d at 586. Ultimately, the court applied the "pure question of law" exception to this case. *See Consolidated I,* 166 F.Supp.2d at 587.

The trial court accepted Consolidated's view that "this case presents a pure legal issue that . . . requires only an examination of [19 U.S.C. § 1675(a)(2)] . . . It does not . . . require the application of any special . . . expertise [from Commerce] for the development of a special factual record either before or after the Court's consideration of the issue." *Id.* Consolidated, however, did not argue only that 19 U.S.C. § 1675 requires Commerce to apply the final results to its AFB entries. In addition, Consolidated argues that Commerce violated its well-established prior practice of applying the final results of administrative reviews to importers who did not participate in the review, but import the

same merchandise from resellers without their own established antidumping rates. Thus Consolidated alleged that Commerce arbitrarily changed its well-established practice and contravened the reasonable expectations of importers. These allegations require a factual record of Commerce's past practice and an assessment of Commerce's justifications for any departure from that past practice. Statutory construction alone is not sufficient to resolve this case. Accordingly, this court finds that this case does not qualify for the "pure question of law" exception to the exhaustion doctrine.

Nevertheless, this court finds that Consolidated did not fail to exhaust its administrative remedies. Because, as noted earlier, Consolidated challenges liquidation instruction practices and not the administrative review itself, its failure to participate in the administrative review does not preclude judicial review. Indeed, the United States could not identify any administrative process available to challenge liquidation instructions issued by Commerce. The record in this case does not disclose any statutory or regulatory provision that allows a party to challenge the manner in which Commerce implements the final results of an administrative review. Without an administrative procedure to exhaust, this court holds that Consolidated did not violate the exhaustion doctrine. Thus, the trial court properly exercised jurisdiction over the merits of this action.

Requirements of 19 U.S.C. § 1675(a)(2)(C)

Turning to the merits, "this Court will apply the standard of review set forth in 5 U.S.C. § 706 to an action instituted pursuant to 28 U.S.C. § 1581(i)." *Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1324 (Fed. Cir. 2001). In other words, this court reviews the trial court's decision *de novo*, reapplying the same standard utilized by that court. Section 706 of Title 5 of the United States Code states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The Court of International Trade dismissed Consolidated's allegations that Commerce, by issuing the 1998 instructions, violated Consolidated's Fifth Amendment Due Process rights and the procedural requirements of the Administrative Procedure Act. *Consolidated I*, 166 F.Supp.2d at 589–90. Consolidated does not re-assert those arguments on appeal. Therefore, Commerce's liquidation instructions in this case will only be set aside if found to be arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law.

The trial court determined that Commerce's 1998 instructions both violated 19 U.S.C. § 1675(a)(2)(C) and arbitrarily departed from its established past practice. Turning first to the alleged statutory violation, this court reviews statutory interpretation without deference. *See Lynteq, Inc. v. United States,* 976 F.2d 693, 696 (Fed. Cir. 1992). The Court of International Trade held that the framework of section 1675(a)(2) does not permit Commerce to reassess antidumping duties after an administrative review and issuance of instructions to implement the results of that review. According to the trial court, the 1998 instructions were an unlawful modification of the rates applied by the 1997 instructions.

Section 1675 sets forth the framework for an administrative review of antidumping duties. This section clearly places the focus of the administrative review on the *entry* of merchandise. For example, section 1675(a)(2)(A) requires Commerce to "determine . . . the normal value and export price (or constructed export price) of each *entry* of subject merchandise, and . . . the dumping margin for each such *entry*." 19 U.S.C. § 1675(a)(2)(A) (emphases added).

Thus, antidumping duties ensure that each import reflects correct market values. Once the review sets the market value of the merchandise, the focus shifts to importation of the merchandise, not

the character of the merchandise itself. Accordingly, importers of the same merchandise can have different antidumping duties, just as the final results in this case established various importer-specific rates for those who participated in the review. The character of the merchandise does not control the assessment of duties, but the market forces in play at the time of each separate import transaction. The simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties. Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties.

During an administrative review, Commerce analyzes the data related to the manufacturer and third-party resellers that export the subject merchandise to the United States. If no information about import transactions with a particular reseller is before Commerce during the review, then the transactions of an importer who imports the subject merchandise from that reseller do not fall within the scope of the review. In *Remand II,* Commerce reasonably explained as follows:

> It is our view that we did not conduct a review of all FAG-produced merchandise regardless of the exporter or reseller of this merchandise. We initiated this administrative review for FAG and our mandate was to review FAG's pricing practices with respect to

> its sales of subject merchandise. The mandate did not extend to other parties which may have acquired FAG-produced bearings second- or third-hand and then exported or resold these bearings in the United States. In cases in which resales are beyond the control of the reviewed party, such as FAG, it is our practice to review the pricing practices of the reseller when we are asked to do so. To do otherwise, in our opinion, would permit the circumvention of the antidumping law by allowing the resellers to benefit because they may be dumping to a greater extent than the party under review during the period in question. Therefore, we did not issue the liquidation instructions of August 4, 1998, to the U.S. Customs Service to correct for errors or deficiencies in the September 9, 1997, instructions. Rather, the purpose of the August 4, 1998, instructions was to cover imports not subject to the scope of the September 9, 1997, instructions.

With this framework in mind, section 1675(a)(2)(C) takes on particular significance for this case. That section requires the final results of an administrative review to "be the basis for the assessment of countervailing or antidumping duties on *entries* of merchandise covered by the determination and for deposits of estimated duties."

19 U.S.C. § 1675(a)(2)(C) (2000) (emphasis added). This subsection requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The "entries" must be "covered by the determination" to gain entitlement to the review's results as the "basis for the assessment" of duties. *Id.*

Commerce's analysis of one transaction or entry does not necessarily produce rates applicable to a wholly separate and distinct transaction. Subsection 1675(a)(2)(C) requires Commerce to apply the final results to those transactions covered in the review. The subsection neither requires nor precludes Commerce from applying those results to entries outside the review. Because subsection 1675(a)(2)(C) does not compel Commerce to apply the final results of an administrative review to any entries of merchandise that were not covered in the administrative review, this court reverses the contrary holding of the trial court.

The sales practices of the reseller that exports the AFBs to Consolidated were simply not covered by the administrative review. Therefore, Consolidated's imports are not within the scope of the final results or the 1997 instructions. This court is not persuaded by any of Consolidated's arguments that the rates in the final results, and not the cash deposit rates at the time of entry, must apply to Consolidated's imports. Consolidated simply has no

statutory entitlement under section 1675(a)(2)(C) to the antidumping rates in the final results over those cash deposit rates.

Consolidated's Actions

Because title 19 does not afford Consolidated a statutory right to relief, as explained above, Consolidated is left with its argument that Commerce's 1998 instructions arbitrarily departed from its well-established liquidation practices. Consolidated argues that Commerce has consistently, in the past, applied a weighted average of the manufacturer's dumping rates in the final results to an importer that imports merchandise made by the manufacturer from an unaffiliated reseller not covered by the administrative review. Relying on that past practice, Consolidated alleges that it had no reason to participate in the administrative review. It fully expected Commerce to apply a weighted average of the final results to its imports. Thus, Consolidated charges that Commerce's departure was an arbitrary disruption of expectations without notice.

Commerce recognizes that confusion exists with respect to its policy concerning importation from resellers. In this case, Commerce asserts that it was within its discretion, and not an arbitrary departure from established practice, to liquidate Consolidated's entries at the cash deposit rates at the time of entry, often referred to as "automatic liquidation." Recently, Commerce finalized a notice, which "clarifies the Department of Commerce's . . .

regulation, 19 C.F.R. § 351.212(c), regarding automatic liquidation where a [reseller] exports the merchandise." *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 Fed. Reg. 23954 (May 8, 2003). According to that clarification, Commerce will not impose automatic liquidation at the existing cash deposit rates on parties that import, from a reseller, merchandise produced by a manufacturer covered by an administrative review. *Id.* Rather, Commerce will determine whether the manufacturer had knowledge that the merchandise sold to the reseller was headed for the United States. If the manufacturer had knowledge of the reseller's sales into the United States, Commerce will apply the manufacturer's rate. If the manufacturer had no such knowledge, Commerce will apply the "all others" rate. *Id.* That clarification applies to all administrative reviews, effective May 1, 2003. *Id.* The clarification does not help resolution of this case on this record. At most, Commerce's recent policy statements may help identify Commerce's consistent past-practice.

At oral argument, this court asked the parties to identify prior instances where an administrative review was held and Commerce either applied the existing cash deposit rates or the manufacturer's rate in the final results to imports from a reseller not covered by the administrative review. Neither party could identify any specific cases on either side. Further, the record does not contain sufficient evidence to determine Commerce's consistent practice, if any, prior to this case. This court, therefore, finds the record in this case insufficient to

facilitate a determination of whether Commerce acted within its discretion or arbitrarily.

The trial court's method of analysis with regard to the issue of arbitrariness was misplaced. Although the trial court found Commerce's actions arbitrary, it based that determination on its flawed conclusion that section 1675(a)(2)(C) required Commerce to use the final results as the basis for the rates on Consolidated's imports. The trial court considered the 1998 instructions a violation of section 1675(a)(2)(C) because they improperly modified the 1997 instructions that were based on the final results. In other words, the Court of International Trade examined the two instructions at issue for any conflict. The statute, however, does not compel that comparison, nor can that comparison reveal any arbitrariness in Commerce's action. Commerce's expertise endows it with discretion to determine when and how to implement the final results beyond their literal, statutory scope. *See Nippon Steel Corp. v. United States,* 337 F.3d 1373, 1379 (Fed.Cir.2003) ("Commerce's special expertise in administering the anti-dumping law entitles its decisions to deference from the courts").

Consistent with § 1675(a)(2)(C), the 1997 instructions merely required application of the importer-specific rates to importers within the scope of the review. The 1998 instructions required automatic liquidation for all imports not addressed in the 1997 instructions. Thus, under a proper reading of § 1675(a)(2)(C), the two instructions are not inconsistent. This case requires a determination

of whether Commerce had a consistent practice from which it departed when it required automatic liquidation of Consolidated's entries of AFBs. Rather than comparing the 1997 and 1998 instructions to each other, the proper mode of analysis requires comparison of Commerce's actions before this case with Commerce's actions in this case. If that analysis shows that Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary. *See RHP Bearings v. United States,* 288 F.3d 1334, 1347 (Fed.Cir.2002) ("an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." (Citation omitted.))

In other words, both sets of instructions implemented Commerce's final results. In order to show that the 1998 instructions were arbitrary and capricious, Consolidated must show that Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice. Because the record is not sufficiently developed for resolution of this issue, this court vacates the trial court's judgment that Commerce was arbitrary in its actions and remands the case for further adjudication on this issue. Thus, this court vacates the trial court's affirmance of Commerce's *Remand II.*

III.

Title 19, § 1675(a)(2)(C), only requires Commerce to apply the final results of an

administrative review to those import transactions specifically covered by the review. Consequently, the trial court's holding that the statute compels Commerce to apply the 1997 instructions to the imports of Consolidated is reversed. In addition, this court vacates the judgment of the trial court that Commerce acted arbitrarily and remands for further adjudication consistent with this opinion. On remand, the trial court will have the opportunity to examine whether Commerce had a consistent past-practice with respect to imports from unrelated resellers not covered by the administrative review, whether there was any departure in this case from a consistent past practice, and whether that departure was arbitrary.

COSTS

Each party shall bear its own costs.

REVERSED, VACATED, and REMANDED.

App. 50

CONSOLIDATED BEARINGS COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

04-1556

United States Court of Appeals

for the Federal Circuit

412 F.3d 1266

June 21, 2005

Christopher R. Wall, Pillsbury Winthrop Shaw Pittman LLP, of Washington, DC, argued for plaintiff-appellant. With him on the brief was William DeVinney.

Cristina Ashworth, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and David Silverbrand, Trial Attorney. Of counsel on the brief were John D. McInerney, Chief Counsel, Berniece A. Browne, Senior Counsel, and Patrick V. Gallagher, Jr., Senior Attorney, Office of Chief

Counsel for Import Administration, United States Department of Commerce, of Washington, DC.

Appealed from: United States Court of International Trade, Senior Judge Nicholas Tsoucalas

Before CLEVENGER, RADER, and DYK, Circuit Judges.

CLEVENGER, Circuit Judge.

Plaintiff-appellant Consolidated Bearings Company ("Consolidated") appeals the United States Court of International Trade's decision affirming the final results of a redetermination by the Department of Commerce ("Commerce") pursuant to a remand order from the Court of International Trade. See Consol. Bearings Co. v. United States, 346 F. Supp. 2d 1343 (Ct. Int'l Trade 2004). In the final results, Commerce determined that it did not depart from a consistent past practice by instructing the United States Customs Service ("Customs") to liquidate Consolidated's unreviewed entries of antifriction bearings ("AFBs") from an unrelated reseller at the original cash deposit rate rather than the manufacturer's rate established pursuant to an administrative review. Final Results of Redetermination Pursuant to Court Remand, slip op. 04-10, at 6 (Apr. 28, 2004) ("Remand Redetermination"). Because substantial evidence supports Commerce's determination that it has in the past consistently liquidated unreviewed entries from an unrelated reseller at the cash deposit rate when the manufacturer has no knowledge that the subject merchandise is ultimately destined for the

United States, we affirm the Court of International Trade's judgment.

I

In 1989, after determining that certain imported AFBs were being sold below fair value in the United States to the detriment of domestic industry, Commerce issued antidumping duty orders concerning AFBs exported from several countries, including Germany. See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 20,900 (May 15, 1989). Between 1989 and 1997, Consolidated purchased and imported from an unaffiliated foreign reseller AFBs manufactured by FAG Kugelfischer Georg Schaefer KgaA ("FAG"). Consolidated consequently paid cash deposits of estimated antidumping duties based on the rates Commerce assigned to FAG in the antidumping duty orders concerning AFBs.

After receiving requests from domestic importers for an administrative review of the antidumping duty order applicable to AFB imports from FAG and others, Commerce initiated an administrative review on June 11, 1990. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews, 55 Fed. Reg. 23,575 (June 11, 1990). Because Consolidated did not request an

administrative review for the reseller's sales to Consolidated, and neither Consolidated nor the reseller participated in the review, Commerce did not consider Consolidated's entries of AFBs in the review.

On July 11, 1991, Commerce published the final results of the administrative review and stated that "[w]ith respect to companies not participating in this review, presumably all interested parties were satisfied with the previously published cash deposit rates for assessment purposes." Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 31,692, 31,700 (July 11, 1991). Commerce ultimately amended the results to include weighted-average antidumping duty rates for various exporters, including one for FAG. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany; et al.; Amended Final Results of Antidumping Duty Administrative Reviews, 62 Fed. Reg. 32,755, 32,756 (June 17, 1997). Under these final results, each participating importer of FAG-manufactured AFBs received a new duty rate.

On September 9, 1997, Commerce instructed Customs to liquidate AFBs pursuant to the final results of the administrative review. See Liquidation Instructions for Antifriction Bearings (Other than Tapered Roller Bearings) & Parts Thereof From Germany, Message No. 7252113 (Sept. 9, 1997) ("September 1997 instructions"). Because Consolidated did not participate in the review, the

final results did not include a new antidumping duty rate for Consolidated or its reseller. On August 4, 1998, Commerce again instructed Customs that if it was "still suspending liquidation on any entries of AFBs from Germany . . . after applying all of the above liquidation instructions, [it] should now liquidate such entries at the deposit rate required at the time of entry of the merchandise"—a rate higher than that set forth in the September 1997 liquidation instructions for named importers of AFBs manufactured by FAG. Liquidation Instructions for AFBs and Parts Thereof from Germany from the Period 11/9/88 Through 4/30/90, Message No. 8216117 (Aug. 4, 1998) ("August 1998 instructions"). Commerce thereafter liquidated Consolidated's imports of AFBs at the cash deposit rate.

Consolidated filed suit pursuant to 28 U.S.C. § 1581(i) in the Court of International Trade, seeking to invalidate the August 1998 instructions. See Consol. Bearings Co. v. United States, 166 F. Supp. 2d 580 (Ct. Int'l Trade 2001). The case was ultimately appealed to this court, and we held that 19 U.S.C. § 1675(a)(2)(C)—which explains that a determination of antidumping duties in an administrative review shall "be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties"—does not afford an importer a statutory right to have the results of an administrative review applied to its entries if Commerce did not consider the entries in the review. Consol. Bearings Co. v. United States, 348 F.3d 997,

1005-06 (Fed. Cir. 2003). We nonetheless remanded the case for a determination of whether "Commerce had a consistent past-practice with respect to imports from unrelated resellers not covered by the administrative review, whether there was any departure in this case from a consistent past practice, and whether that departure was arbitrary." Id. at 1008. The Court of International Trade in turn remanded the case to Commerce. See Consol. Bearings Co. v. United States, No. 98-09-02799 (Ct. Int'l Trade Jan. 30, 2004).

Upon remand, Commerce identified its past practice with respect to unaffiliated resellers as follows:

> The Department's past practice has been to assess the reseller's sales separately from those of the manufacturer, provided that the manufacturer does not have knowledge that its sales to the reseller are ultimately destined for the United States. If the request for review is made for a reseller and its supplier does not know that the reseller is exporting the merchandise to the United States, then the Department will calculate a rate for the reseller based on the reseller's pertinent sales made during the period of review. If a request for review is not made for the reseller, however, then the Department treats the reseller as any unreviewed company and assesses a

> duty at the rate required on the merchandise at the time of entry . . . .

Remand Redetermination at 6 (citation omitted).

The Court of International Trade upheld Commerce's assessment of its past consistent practice and ruled that Consolidated's imports were dutiable at the cash deposit rate. Consol. Bearings, 346 F. Supp. 2d at 1347-48. The Court of International Trade further determined that Commerce in the past has deviated from this practice only when both of the following factors were present: (1) the importer did not participate in the administrative review; and (2) no rate other than the manufacturer's review rate was assessed by Commerce in the review proceedings. Id. at 1347. Because Commerce assessed rates other than the manufacturer's review rate to other resellers, the Court of International Trade determined that a departure by Commerce from its past consistent practice to accommodate Consolidated was not warranted. Id. Consolidated appeals. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(5) (2000).

II

In reviewing decisions by the Court of International Trade in actions pursuant to 28 U.S.C. § 1581(i), we apply the standard of review set forth in the APA and will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §

706 (2); Humane Soc'y of the United States v. Clinton, 236 F.3d 1320, 1324 (Fed. Cir. 2001) ("[T]his Court will apply the standard of review set forth in 5 U.S.C. § 706 to an action instituted pursuant to 28 U.S.C. § 1581(i)."). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence , or represents an unreasonable judgment in weighing relevant factors." Star Fruits S.N.C. v. United States, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

"Substantial evidence" describes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. v. Nat'l Labor Relations Bd., 305 U.S. 197, 229 (1938). To determine if substantial evidence exists, we review the record in its entirety, including all evidence that "fairly detracts from the substantiality of the evidence." Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

III

The case is now before us for the limited purpose of determining whether substantial evidence supports Commerce's finding that its August 1998 instructions to Customs reflect a consistent past practice of liquidating unreviewed entries from unrelated resellers at the cash deposit rate rather than the manufacturer's review rate, provided that the manufacturer does not have knowledge that its sales to the reseller are ultimately destined for the United States, or instead are an unjustified departure from a contrary past

practice without reasonable explanation. It was Consolidated's burden on remand to prove the latter. See Consol. Bearings, 348 F.3d at 1007 ("In order to show that the 1998 instructions were arbitrary and capricious, Consolidated must show that Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice.").

Upon considering all of the evidence set forth by Commerce in its Remand Redetermination, and all of the evidence presented by Consolidated, we conclude that Commerce did not arbitrarily depart from a past practice of liquidating unreviewed entries at the cash deposit rate rather than the manufacturer's review rate.

A

Commerce first calls attention to the distinction in 19 C.F.R. § 353.22(e)(1) (1995) between reviewed and unreviewed entries. During the relevant time period, subsection 353.22(e)(1) read as follows:

> [I]f [Commerce] does not receive a timely request [for an administrative review], [Commerce] . . . will instruct the Customs Service to assess antidumping duties on the merchandise . . . at rates equal to the cash deposit of . . . estimated antidumping duties required on that merchandise at the time of entry . . . .

19 C.F.R. § 353.22(e)(1) (1995). The existence of a regulation does not, by itself, establish that Commerce consistently acted according to its terms. Subsection 353.22(e)(1) does, however, shed light on what Commerce during the relevant time period publicized its practice to be. In light of our determination in Consolidated Bearings that 19 U.S.C. § 1675 does not afford an importer statutory entitlement to use of the results of an administrative review as the basis for Commerce's assessment of duties on the importer's unreviewed entries, 348 F.3d at 1006, the meaning behind subsection 353.22(e)(1) is clear. Commerce's past practice, at least as described by the regulation, was to liquidate unreviewed entries at the cash deposit rate.

Commerce next states that its practice of assessing antidumping duties on an importer-specific basis was described in the preliminary and final decision notices in the present case, both of which issued well before the August 1998 instructions at issue. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 31,692, 31,694 (July 11, 1991) ("[W]e will calculate wherever possible an exporter/importer-specific assessment rate [which will] . . . be assessed uniformly on all entries of the class or kind of merchandise by that particular importer during the review period."); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Preliminary Results of Antidumping Duty

Administrative Reviews and Partial Termination of Administrative Reviews, 56 Fed. Reg. 11,200, 11,201 (Mar. 15, 1991) ("[W]e will calculate an importer-specific ad valorem appraisement rate for each class or kind of antifriction bearings [which] . . . will be assessed uniformly on all entries of that particular importer made during the review period."). We agree with Commerce that the notices are consistent with our interpretation of subsection 353.22(e)(1)—i.e., that the notices reflect Commerce's intention to calculate duty rates on an importer-specific basis and Commerce's focus on a given importer's entries of AFBs in calculating and assessing the duties.

Commerce finally offers five actual instructions to Customs to liquidate entries from unreviewed resellers involved in the review of AFBs from France, Japan, Singapore, Sweden and the United Kingdom at the cash deposit rate. The following instruction is representative:

> If you are still suspending liquidation on any entries of AFBs from France during the period 11/9/88 through 4/30/90 after applying all of the above liquidation instructions, you should now liquidate such entries at the deposit rate required at the time of entry of the merchandise.

(App. at 141.) As Consolidated correctly observes, the five instructions pertain to the same administrative review of AFBs that brought about the instructions at issue here. There is no doubt, however, that they were issued prior to the August

1998 instructions pertaining to Consolidated's entries in this case. In light of the regulatory context provided by subsection 353.22(e)(1) and the lack of any evidence to the contrary, we determine the instructions to be substantial evidence that Commerce's past practice was to liquidate at the cash deposit rate rather than at the manufacturer's review rate all entries not reviewed by Commerce in an administrative review, provided that the manufacturer had no knowledge of the ultimate destination of the subject merchandise. We further agree with the Court of International Trade that Commerce did not arbitrarily depart from that practice here.

B

For its part, Consolidated first points in the record to over one hundred pages of liquidation instructions issued by Commerce to Customs. But Consolidated does little to explain the relevance of any of the instructions beyond an assertion that many provide for the liquidation of "all" subject entries, and that "all" means exactly that—every entry from the manufacturer, regardless of whether it was reviewed. Upon review of the instructions, however, we determine that there simply is no suggestion in any of them that Commerce intended to apply the results of the review of a particular producer to the unreviewed exports of a reseller—no suggestion that "all" encompasses something more than all entries actually reviewed by Commerce in arriving at a final dumping margin determination.

Consolidated also makes much of the Court of International Trade's findings in Nissei Sangyo America, Ltd. v. United States, No. 00-00113, 2003 WL 21972722 (Ct. Int'l Trade Aug. 18, 2003), Renesas Technology America, Inc. v. United States, No. 00-00114, 2003 WL 21972721 (Ct. Int'l Trade Aug. 18, 2003), and ABC International Traders, Inc. v. United States, 19 C.I.T. 787 (1995), arguing that the court therein found that Commerce has in the past applied a final determination of a manufacturer's dumping margin for particular merchandise to all importers of such merchandise, regardless of whether the importer participated in the administrative review. While the Court of International Trade expressly found in Nissei and Renesas that Commerce "changed its past practice of liquidating at the rate established for the most recent period for the manufacturer of the merchandise," Nissei, 2003 WL 21972722, at *6 (quotation omitted); see also Renesas, 2003 WL 21972721, at *6, prior decisions by the Court of International Trade do not constitute evidence of Commerce's past practice and are not binding on this court. Furthermore, the Court of International Trade in ABC International rejected the importer's attempts to establish that the Japanese manufacturers at issue in the case had no knowledge of the ultimate destination of their merchandise, and therefore at least implicitly recognized the import to Commerce's antidumping duty calculus of the manufacturer's knowledge of the ultimate destination of subject merchandise. But to the extent that these cases offer some support for the conclusion sought by Consolidated on appeal, we

disagree with the findings therein and hold to the contrary that the Court of International Trade did not err in affirming Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate.

Finally, Consolidated complains that Commerce did not affirmatively act to provide Consolidated with access to "non-public files" containing Commerce's past instructions to Customs in other cases. Specifically, Consolidated argues that "Commerce should have requested permission to release confidential information" and that "Commerce has not offered any evidence, or even any argument, why obtaining such permission would be an undue burden." (Reply Br. of Appellant at 10-11.) We note, however, that Consolidated does not contend that the Court of International Trade rejected a discovery request from Consolidated to provide these liquidation instructions in redacted form. We have reviewed the record established before the Court of International Trade in this case and have found no proper attempt by Consolidated to pursue additional discovery to gain access to proprietary materials that may have been submitted to Commerce in confidence.

The record discloses that when the Remand Determination was before the Court of International Trade, Commerce averred that "there is some difficulty in demonstrating the consistent language in liquidation instructions regarding the treatment of reviewed and unreviewed companies across different administrative reviews given the proprietary nature of some information in the

instructions (i.e., identities of importers/customers) that would have provided more meaning to their use as examples." Rebuttal Comments, July 19, 2004. Commerce did not aver that it had in fact relied on instructions in files covered by such proprietary restrictions. Neither the Court of International Trade nor this court relies on any information from such files in affirming the Remand Determination. And, as noted above, the record does not disclose any attempt by Consolidated to force release of the proprietary information to which Commerce alluded but on which it did not rely.

Consolidated's complaint that Commerce did not take affirmative steps to liberate certain files from proprietary restrictions, presumably by appropriate redaction of confidential material, has no merit in this case, since the information that was deemed proprietary was not specifically requested and was not used by the agency or the courts in reaching a decision adverse to Consolidated.

Although Commerce may not disclose information designated as proprietary by the person submitting the information without consent of the submitting person, see 19 U.S.C. § 1677f(b)(1)(A) (2000), for Commerce to defend the reasonableness of its position based on proprietary information while refusing to release the information from confidentiality restriction would raise serious questions, as would Commerce's refusal to release information that would contradict the agency's position. Whether Commerce in such a case could by redaction or otherwise satisfy the test of section

1677f(b)(1)(A) would be a matter for the court to decide.

IV

In conclusion, upon reviewing anew the totality of the evidence before the Court of International Trade, and the full record on appeal, we conclude that Consolidated failed to meet its burden of showing that the August 1998 instructions were arbitrary and capricious, i.e., that Commerce consistently followed a practice in similar circumstances contrary to that outlined in the August 1998 instructions and provided no reasonable explanation for the change in practice. Indeed, substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate.

In reaching this conclusion, however, we reject the Court of International Trade's determination that Commerce in the past has deviated from its consistent practice only when (1) the importer did not participate in the administrative review; and (2) no rate other than the manufacturer's review rate was assessed by Commerce in the review proceedings. Neither Consolidated nor Commerce advocates use of the factors to explain past deviations from Commerce's consistent practice, and we find no support for their use for that purpose in the record.

The decision of the Court of International Trade to affirm Commerce's Remand Redetermination is hereby affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED

RENESAS TECHNOLOGY AMERICA, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant,

and

MICRON TECHNOLOGY, INC.,
Defendant-Appellant.

04-1473, -1474

United States Court of Appeals
for the Federal Circuit

2005 U.S. App. LEXIS 21877

September 19, 2005

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 26, 2005.

FOR THE COURT

Jan Horbaly
Clerk

No. 05-986

In the Supreme Court of the United States

RENESAS TECHNOLOGY AMERICA, INC., PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's practice, in connection with administrative reviews of antidumping duties, of liquidating unreviewed entries from independent resellers at the cash deposit rate rather than the rate determined by a review of entries exported by the producer.

In the Supreme Court of the United States

No. 05-986

RENESAS TECHNOLOGY AMERICA, INC., PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter, but is reprinted in 140 F. App'x 943. The opinion of the Court of International Trade (Pet. App. 4-19) is reported at 25 I.T.R.D. (BNA) 2147, and is available at 2003 WL 21972721.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2005. A petition for rehearing was denied on September 19, 2005 (Pet. App. 67-68). On December 5, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 2, 2006, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

This case concerns a challenge to instructions given by the Department of Commerce (Commerce) to Customs and Border Protection to finally assess duties upon, *i.e.*, to "liquidate," certain merchandise imported by petitioner that was subject to an antidumping duty concerning dynamic random access memory semiconductors (DRAMs) from the Republic of Korea. See Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15,467 (1993); Antidumping Duty Order and Amended Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, 58 Fed. Reg. 27,520 (1993). The liquidation instructions contested by petitioner were issued subsequent to Commerce's final determinations after conducting administrative reviews of the antidumping order. See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216 (1996); Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965 (1997).

The facts of this case are identical in all material respects to those in another case, arising out of the same antidumping order and the same liquidation instructions, in which a petition for a writ of certiorari is currently pending, *Hitachi High Technologies America,*

Inc. v. *United States* (*Hitachi*), No. 05-918 (filed Jan. 17, 2006). The decisions of the Court of International Trade in the two cases, which were issued by the same judge (Goldberg, J.) on the same day, are identical with the exception of the parties' names. Compare Pet. App. 4-19 with 05-918 Pet. App. 7a-23a. Likewise, the court of appeals' decision in petitioner's case was issued by the same panel on the same day as the decision at issue in the *Hitachi* petition, compare Pet. App. 1-2 with 05-918 Pet. App. 1a-6a, and the decision in this case disposed of the appeal on the basis of the decision in *Hitachi*, which the court of appeals noted was "materially indistinguishable." Pet. App. 2.[1] We therefore incorporate by reference the statement set forth in the government's brief in opposition in *Hitachi*, a copy of which is provided herewith to petitioner.

ARGUMENT

The arguments advanced by petitioner are largely the same as those articulated by petitioner in the *Hitachi* petition. Compare Pet. 17-27 with 05-918 Pet. 11-17. We therefore incorporate by reference the argument set forth in the government's brief in opposition in *Hitachi*. Any additional arguments presented by petitioner do not alter the conclusion that the decision of the court of appeals is correct and that review by this Court is not warranted.

It is notable that, in contrast to Hitachi, petitioner here acknowledges (Pet. 19-21) that the supposed conundrum faced by importers that Hitachi urges as a basis of review, see 05-918 Pet. 15-16—*i.e.*, the assertion that

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[1] Hitachi High Technologies America, Inc., was formerly known as Nissei Sangyo America, Ltd., and the court of appeals caption bears the earlier name. See 05-918 Pet. App. 1a.

importers must either purchase from producers directly and forego competitive pricing or acquiesce in paying the allegedly inflated "all others" rate—can, in fact, be avoided if "the importer requests a review of its reseller." Pet. 19. Petitioner claims that a separate review of its reseller would have been "redundant" and "pointless" because petitioner "followed the market" and therefore, petitioner asserts, its reseller "should have had the same review result as LG [Semicon Co., Ltd.]." Pet. 20-21. Plainly, neither Commerce nor this Court is obliged to accept on faith petitioner's claim that its unidentified third-party reseller was not engaging in independent dumping behavior.

Petitioner also argues (Pet. 25-26) that Commerce's policy, adopted in 2003, of liquidating imports from unreviewed independent resellers at the "all others" rate (see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 Fed. Reg. 23,954) is inconsistent with Commerce's policy of requiring cash deposits at the rate established for the producer. Because the policy to liquidate at the "all others" rate was adopted only prospectively for administrative reviews requested after the new policy was finally promulgated, see *id.* at 23,961, and was not applied to petitioner, there is no occasion for the Court to review that policy at this time.

In any event, Commerce has explained why the producer's cash deposit rate is used as the estimated antidumping duty for all imports of that producer's merchandise. Because it lacks any better information at the time of entry, Commerce operates on "the assumption * * * that the producer made the U.S. sales." 68 Fed. Reg. at 23,958. As Commerce described:

> while entry was made at the producer's cash-deposit rate under a reasonable assumption at the time of entry that the producer was involved in the U.S. transaction, through the administrative review the producer identified its actual customers and importers for its U.S. sales and only entries involving those customers and importers are appropriately assessed duties based on the results of the review.

Ibid. Petitioner's argument, in effect, attempts to turn Commerce's pragmatic policy of using the producer's cash deposit rate as an estimated dumping duty until the administrative review provides importer-specific data into an entitlement to have imports from an independent reseller liquidated at the producer's rate. Neither the statutory text nor logic compels such a result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2006

(3)

No. 05-986

In The
Supreme Court of the United States

RENESAS TECHNOLOGY AMERICA, INC.,

Petitioner,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Federal Circuit

BRIEF IN OPPOSITION OF MICRON TECHNOLOGY, INC.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit ("Federal Circuit") correctly held that certain entries of dynamic random access memory semiconductors ("DRAMs") imported by Renesas Technology America, Inc. ("Renesas") were not "covered" by the first and second administrative review determinations of the antidumping order on DRAMs from Korea under 19 U.S.C. § 1675(a)(2)(C) and, therefore, were subject to the cash deposit rate paid upon entry when (i) Renesas purchased its DRAMs from a Japanese reseller unrelated to the Korean manufacturer, (ii) the domestic interested party's requests for reviews of the Korean manufacturer did not encompass the Japanese reseller's pricing practices, (iii) Renesas failed to request its own reviews of the reseller's pricing practices, and (iv) the Japanese reseller's pricing practices were not actually examined during the first or second administrative reviews.

PARTIES TO THIS PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are the same as those in the Federal Circuit: Petitioner Renesas and Respondents, the United States and Micron Technology, Inc. ("Micron"). Micron has no parent company, and no publicly held company owns 10 percent or more of Micron's stock.

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BRIEF IN OPPOSITION OF MICRON TECHNOLOGY, INC.

Micron respectfully opposes the petition for writ of *certiorari* filed by Renesas to review the judgment of the Federal Circuit. The Federal Circuit deemed that judgment to be non-precedential under Federal Circuit Rule 47.6(b), that is, "one determined by the panel issuing it as not adding significantly to the body of law." For the reasons set forth below, Renesas's petition should be denied.

I. OPINIONS BELOW

The decision of the Federal Circuit is unpublished, but is reported as *Renesas Tech. Am., Inc. v. United States*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 21877 (Fed. Cir. Sept. 19, 2005), *petition for cert. filed*, No. 05-986 (U.S. Feb. 2, 2006). The decision also is attached to Renesas's petition at Appendix 1-3.

The decision of the United States Court of International Trade ("CIT") is unpublished, but is reported at *Renesas Tech. Am., Inc. v. United States*, No. 00-00114, 2003 Ct. Intl. Trade LEXIS 105 (Ct. Int'l Trade Aug. 18, 2003), *rev'd*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 21877 (Fed. Cir. Sept. 19, 2005). The decision also is attached to Renesas's petition at Appendix 4-19.

II. JURISDICTION

The Federal Circuit entered judgment on July 1, 2005, and denied Renesas's petition for panel rehearing and rehearing *en banc* on September 19, 2005. (Pet. App. 3, 67-68).

Renesas sought and received an extension of time to file its petition for writ of *certiorari* to and including February 2, 2006. Renesas filed its petition for writ of *certiorari* on February 2, 2006. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

III. STATUTES AND REGULATIONS

Pursuant to Rules 15.3 and 24.2, Respondent Micron is satisfied with Petitioner's statement except with respect to Petitioner's presentation of regulations. The following regulations apply.[1]

§ 353.2 Definitions. . . .

(k) *Interested party.* "Interested party" means: . . .

(3) A producer in the United States of the like product or seller (other than a retailer) in the United States of the like product produced in the United States;

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[1] The regulations applicable to these proceedings are those in effect before the enactment of the Uruguay Round Agreements Act ("URAA"). The earlier version of these regulations is published in the Federal Register at *Antidumping Duties*, 54 Fed. Reg. 12742 (Dep't Commerce Mar. 28, 1989). The post-URAA regulations, 19 C.F.R. Part 351, apply to "administrative reviews initiated on the basis of requests made on or after the first day of July 1997. . . . Segments of proceedings to which part 351 [*i.e.*, the post-URAA regulations] do not apply will continue to be governed by the regulations in effect on the date the . . . requests were made for those segments. . . ." 19 C.F.R. § 351.701. Commerce initiated the first review on June 15, 1994, *Initiation Of Antidumping And Countervailing Duty Administrative Reviews And Request For Revocation In Part*, 59 Fed. Reg. 30770 (Dep't Commerce June 15, 1994) and the second review on June 15, 1995, *Initiation Of Antidumping And Countervailing Duty Administrative Reviews*, 60 Fed. Reg. 31447 (Dep't Commerce June 15, 1995).

§ 353.22 Administrative review of orders and suspension agreements.

(a) *Request for Administrative Review; Withdrawal of Request for Review.*

(1) Each year during the anniversary month of the publication of an order (the calendar month in which the anniversary of the date of publication of the order or finding occurs), an interested party, as defined in paragraph (k)(2), (k)(3), (k)(4), (k)(5), or (k)(6) of § 353.2, may request in writing that the Secretary conduct an administrative review of specified individual producers or resellers covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers.

(2) During the same month, a producer or reseller covered by an order may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only a producer or reseller of the merchandise imported by that importer. . . .

(e) *Automatic assessment of duty.*

(1) For orders, if the Secretary does not receive a timely request under paragraph (a)(1), (a)(2), or (a)(3) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraph (b) of this section at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse,

for consumption and to continue to collect the cash deposits previously ordered.

IV. STATEMENT

A. The Antidumping Investigation And Antidumping Duty Order

Pursuant to a petition filed by Micron on April 22, 1992, the United States Department of Commerce ("Commerce") conducted an antidumping duty investigation regarding imports of DRAMs from Korea. Following determinations by Commerce that the subject merchandise was being sold at less than fair value, and by the U.S. International Trade Commission that the subject imports were causing material injury to the domestic industry (including Micron), Commerce published an antidumping duty order. *Antidumping Duty Order And Amended Final Determination: Dynamic Random Access Memory Semiconductors Of One Megabit And Above From The Republic Of Korea,* 58 Fed. Reg. 27520 (Dep't Commerce May 10, 1993). Pursuant to this order, importers of DRAMs originating in Korea and manufactured by LG Semicon, Co. Ltd. (formerly Goldstar Electron, Co., Ltd.) ("LG Semicon") or by Hyundai Electronics Industries, Inc. ("Hyundai") were required to post cash deposits of estimated antidumping duties at the time of entry. The applicable duty deposit rates were 4.97% for DRAMs manufactured by LG Semicon and 11.16% for DRAMs manufactured by Hyundai. *Id.*

B. Statutory And Regulatory Provisions For Administrative Review Of The Antidumping Order

Under the antidumping duty statute and Commerce's implementing regulations, the estimated antidumping duty deposited at the time of entry may be subject to a retrospective review to determine whether the cash deposit rate fairly reflects the margin of dumping for those transactions subject to review. 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(a) (1995) (current version at 19 C.F.R. § 351.213(b)). Each year during the anniversary month of the antidumping duty order, reviews may be requested by the foreign producer, the exporter, the importer, or domestic interested parties. 19 U.S.C. § 1675(a). At the conclusion of a review, Commerce issues liquidation instructions directing the Bureau of Customs and Border Protection ("Customs") to assess antidumping duties on entries covered by the review. The assessments may be at rates higher or lower than the cash deposit rates applicable at the time of entry. If the rate determined in the review is higher, the importer must pay the difference (with interest); if the rate determined in the review is lower, the difference is refunded (with interest). If a party does not request a review, that party's entries are subject to automatic assessment at the cash deposit rates. 19 C.F.R. § 353.22(e) (1995) (current version at 19 C.F.R. § 351.212(c)). This system of reviews on request assumes that interested parties will request reviews if they are in disagreement with the cash deposit rates applied to the subject imports at the time of entry. In fact, Congress specifically established this statutory scheme to place the burden on parties

who wanted their entries reviewed to request a review.[2] As shown below, Renesas failed to request a review.

C. Renesas's Entries And Its Opportunities To Request Administrative Reviews

Renesas imported certain entries of DRAMs manufactured by LG Semicon from July 1993 to May 1995. Renesas purchased the Korean DRAMs from a Japanese reseller not affiliated with LG Semicon, the Korean manufacturer, and imported them with full knowledge that they were subject to the antidumping duty order. Renesas was aware that its DRAMs were subject to the antidumping duty order because it was required to post cash deposits of estimated antidumping duties at the rate specified in the antidumping duty order. Renesas was required by Commerce to post cash deposits at the rate of 4.97% applicable to DRAMs manufactured by LG Semicon. JA 47.

1. The first administrative review (October 1992-April 1994)

On May 4, 1994, in the first anniversary month of the DRAMs antidumping order, Commerce published notice of an opportunity to request a review for the first administrative review period, October 29, 1992 to April 30, 1994. *Antidumping Or Countervailing Duty Order, Finding, Or*

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[2] Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(1), 98 Stat. 2948, 3031 (1984); 19 U.S.C. § 1675(a). In the Trade And Tariff Act of 1984, Congress changed the antidumping law by making administrative reviews optional based upon the request of a party rather than mandatory as was the case under prior law.

Suspended Investigation; Opportunity To Request An Administrative Review, 59 Fed. Reg. 23051 (Dep't Commerce May 4, 1994). Petitioner Micron requested an administrative review of "subject merchandise manufactured and/or sold by [LG Semicon] and or related parties. . . ." JA 66-67. Producers Hyundai and LG Semicon requested administrative reviews of their own pricing practices. JA 48-49, 52-53. Neither Renesas nor its Japanese reseller, which was not affiliated with LG Semicon, requested a review of Renesas's entries or participated in the review requested by the other interested parties. Commerce initiated an administrative review of the antidumping order on DRAMs from Korea pursuant to these requests. *Initiation Of Antidumping And Countervailing Duty Administrative Reviews And Request For Revocation In Part,* 59 Fed. Reg. 30770 (Dep't Commerce June 15, 1994).

On May 6, 1996, Commerce published the final results of the first administrative review. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results Of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216 (Dep't Commerce May 6, 1996). Based on the sales reported by each reviewed company, Commerce found a weighted average dumping margin of 0.00% for LG Semicon and 0.06% for Hyundai. *Id.* at 20222. Because neither Renesas nor its Japanese reseller requested a review, Renesas's entries were not covered by the review and, therefore, were not examined by Commerce.

2. The second administrative review (May 1994-April 1995)

On May 10, 1995, in the second anniversary month of the DRAMs order, Commerce published notice of an opportunity to request an administrative review for the second review period, May 1, 1994 to April 30, 1995. *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review,* 60 Fed. Reg. 24831 (Dep't Commerce May 10, 1995). Petitioner Micron again requested an administrative review of "subject merchandise manufactured and/or sold by [LG Semicon] and/or affiliated parties. . . ." JA 102-103. Producers Hyundai and LG Semicon again requested administrative reviews of their own pricing practices. JA 95-96, 99-100. Commerce initiated the second administrative review of the antidumping order on DRAMs from Korea pursuant to these requests. *Initiation Of Antidumping And Countervailing Duty Administrative Reviews,* 60 Fed. Reg. 31447 (Dep't Commerce June 15, 1995). Again, neither Renesas nor its Japanese reseller requested or participated in this review.

On January 7, 1997, Commerce published the final results for the second review period. Commerce determined a weighted average dumping margin of 0.01% for LG Semicon and 0.10% for Hyundai. *Dynamic Random Access Memory Semiconductors Of One Megabit Or Above From The Republic Of Korea; Final Results Of Antidumping Duty Administrative Review,* 62 Fed. Reg. 965, 968 (Dep't Commerce Jan. 7, 1997). Not having requested or participated in this review, Renesas's entries, purchased from the Japanese reseller, were not taken into account in determining these rates, and no separate rate was calculated for Renesas's entries.

D. Judicial Review Of Commerce's First And Second Administrative Reviews And The Issuance Of Commerce's Liquidation Instructions

Following publication of the final results of the first and second administrative reviews, Micron sought judicial review of certain aspects of Commerce's determinations. In each case, the CIT remanded the determinations to Commerce for further consideration and explanation of the basis for its determination. *See, e.g., Micron Tech. v. United States*, 44 F. Supp. 2d 216 (Ct. Int'l Trade 1999) (remanding first review determination on calculation of research and development expenses); *Micron Tech. v. United States*, 40 F. Supp. 2d 481 (Ct. Int'l Trade 1999) (remanding second review for consideration of constructed export price level of trade issue), *aff'd in part, rev'd in part*, 243 F.3d 1301 (Fed. Cir. 2001).

Following the CIT decisions affirming the redeterminations after remand in the first and second administrative reviews, Commerce issued liquidation instructions to Customs for the first and second administrative reviews on November 1, 1999. Commerce's instructions covering DRAMs from Korea that were entered during the first and second review periods included importer-specific assessment rates for each of the importers whose entries were covered by the first and second administrative reviews, respectively. JA 133-36. According to the instructions, entries of DRAMs from Korea imported by all other importers should be liquidated "at the rates required upon entry," that is, at the cash deposit rate. JA 133-36. The first and second administrative review instructions applied to Renesas's entries as non-reviewed entries not covered by the importer-specific instructions.

E. Judicial Review Of Commerce's Liquidation Instructions

Renesas challenged Commerce's liquidation instructions, and the CIT held that Renesas's entries should be liquidated at the manufacturer's rate calculated during the administrative review. *Renesas Tech. Am., Inc.*, No. 00-00114, 2003 Ct. Intl. Trade LEXIS 105 (Ct. Int'l Trade Aug. 18, 2003) (Pet. App. at 4). The CIT applied the reasoning of a nearly identical case decided by that court, *Consolidated Bearings Co. v. United States*, 166 F. Supp. 2d 580 (Ct. Int'l Trade 2001), *rev'd*, 348 F.3d 997 (Fed. Cir. 2003), and concluded, among other things, that (i) Commerce erred in applying the "knowledge test" to determine whether sales made through a reseller are "covered" by an administrative review and (ii) Commerce's November 1, 1999 liquidation instructions were arbitrary and capricious because they represented a change from Commerce's "past practice of liquidating at 'the rate established for the most recent period for the manufacturer of the merchandise,' 61 Fed. Reg. 20,216, 20,222." *Renesas Tech. Am., Inc.*, No. 00-00114, 2003 Ct. Intl. Trade LEXIS 105, at *17-18 (Ct. Int'l Trade Aug. 18, 2003) (Pet. App. at 18).

Before the United States and Micron filed their appeals, the Federal Circuit reversed the CIT's *Consolidated Bearings* decision. *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003) ("*Consolidated I*"). The Federal Circuit held that an importer's entries purchased from a reseller unaffiliated with the manufacturer are not covered by an administrative review unless information about those entries is before Commerce during the review. *Id.* at 1005. Discussing the applicability of 19 U.S.C. § 1675(a)(2)(C) to sales made by a reseller, the Federal Circuit held the following:

> This subsection requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The "entries" must be "covered by the determination" to gain entitlement to the review's results as the "basis for the assessment" of duties.

Id. at 1005-06. The Federal Circuit also held that Commerce retained the discretion to determine the most appropriate method for assessing antidumping duties on unreviewed entries purchased from a reseller unaffiliated with the manufacturer, *id.* at 1007, and remanded the case with instructions to require the importer to show that "Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice." *Id.* Commerce conducted the remand and concluded that it had a practice of liquidating unreviewed entries from resellers unrelated to the manufacturer at the cash deposit rate. The Federal Circuit affirmed Commerce's remand determination on the ground that "substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." *Consolidated Bearings Co. v. United States*, 412 F.3d 1266, 1272 (Fed. Cir. 2005) ("*Consolidated II*").

In deciding the appeal of the instant case, the Federal Circuit was bound by its decisions in *Consolidated I*, *Consolidated II*, and *Nissei Sangyo Am. Ltd. v. United States*, No. 04-1469, -1492, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 24124 (Fed. Cir. Oct. 18, 2005), *petition for cert.*

filed, No. 05-918 (U.S. Jan. 17, 2006) ("*Nissei Sangyo*").[3] In particular, the Federal Circuit held that

> The relevant facts and issues raised by the parties in this case are materially indistinguishable from those in [*Nissei Sangyo*]. As discussed in *Nissei Sangyo*, this Court's decisions in [*Consolidated I*] and [*Consolidated II*] foreclose appellee's arguments. In those cases, this court held that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that the Department of Commerce ("Commerce") has consistently liquidated unreviewed entries at the cash deposit rate.

Renesas Tech. Am., Inc., No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005) (Pet. App. at 2)

V. REASONS FOR DENYING THE PETITION

A. The Federal Circuit's Decision Does Not Implicate An Important Issue Of Federal Law

1. Renesas seeks *certiorari* review of an assessment practice that was not actually applied to it or adjudicated by the Federal Circuit

Renesas contends that the Federal Circuit's decision imposes substantial and needless costs on U.S. importers that purchase from resellers. (Pet. at 17). Renesas cites certain publications for the proposition that "[s]ome $14

[3] *Nissei Sangyo Am. Ltd. v. United States* is also currently before this Court on a petition for writ of *certiorari*. *Hitachi High Technologies America, Inc. v. United States*, No. 05-918 (U.S. Jan 24, 2006).

billion worth of imports were covered by antidumping tariffs approved between 1994 and 2003 . . . ," *id.*, an average of $1.4 billion per year from 1994 to 2003.[4] In Renesas's view, because no other avenue for review is available to U.S. importers through U.S. courts,[5] *certiorari* review is necessary to prevent the Federal Circuit's decision from becoming "the last word on the matter." (Pet. at 21).

These statements are misleading and irrelevant. Less than 0.5 percent of all imports into the United States are subject to an antidumping duty order,[6] and only a fraction of those imports are purchased from a reseller unrelated to

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[4] Renesas also claims that "U.S. law provides a powerful legal weapon to domestic industries unhappy with foreign competition: the antidumping law. . . ." (Pet. at 17). In fact, the antidumping law is designed to provide a remedy for domestic industries injured as a result of illegal and unfair trade practices undertaken by foreign manufacturers and exporters. *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) ("The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' *i.e.*, at prices below the prices the foreign manufacturers charge for the same products in their home markets."). It is not available to any domestic industry who is merely "unhappy" with foreign competition.

[5] The CIT has exclusive jurisdiction over these cases. 28 U.S.C. § 1581(i). The Federal Circuit has exclusive jurisdiction over appeals from CIT judgments. 28 U.S.C. § 1295(a)(5).

[6] In 1999, Commerce Secretary William Daley testified that U.S. antidumping duty orders affected only a minuscule percent of U.S. imports:

> In 1998, total U.S. imports were $897 billion. Only about $4 billion of those were covered by antidumping duty orders. That means that 0.44 percent – less than one-half of one percent – of our worldwide imports were covered.

Ministerial Meeting of the World Trade Organization (WTO): Hearing Before Senate Finance Comm., Sept. 29, 1999 (Statement of William Daley, Sec'y of Commerce of the United States), *available at* www.ogc.doc.gov/ogc/legreg/testimon/106f/daley0929.htm.

the original foreign manufacturer rather than from the original foreign manufacturer directly. Moreover, as discussed in detail below, the antidumping statute authorizes reviews only upon request, and Commerce's regulations specifically permit importers to request a review of the pricing practices of the unrelated reseller/exporter. Thus, the Federal Circuit's decision affects only a tiny subset of importers – specifically, those who import goods covered by an antidumping duty order sold to them by resellers unrelated to the original manufacturer and who fail to request an administrative review of the reseller/exporter's pricing practices. This Court should not exercise its discretionary *certiorari* jurisdiction over a case that has such little impact on the importing community, particularly when the persons who would be affected by such decision can so easily protect their interests by the simple expedient of requesting an administrative review under the statute. 19 U.S.C. § 1675(a). Again, Renesas did not protect its interests by requesting a review.

The Federal Circuit also appears to have recognized the limited application of its decision when it made the decision non-precedential under Federal Circuit Rule 47.6(b). That rules states that "[a]n opinion or order which is designated as not to be cited is one determined by the panel issuing it as not adding significantly to the body of law."[7]

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[7] The reprint of the Federal Circuit's decision attached to Renesas's petition does not reflect this qualifying language. The Federal Circuit's actual decision, available at No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 21877 (Fed. Cir. Sept. 19, 2005), however, makes clear that the decision is non-precedential.

Renesas attempts to avoid the insignificance of the Federal Circuit's decision to the U.S. importing community by contending that a different assessment policy – one that was not actually applied to it in this case – imposes potentially great costs on U.S. businesses:

> In October 1998, . . . Commerce published in the *Federal Register* its proposal to change its policy concerning the assessment of antidumping duties on merchandise imported from a reseller. Under that policy, . . . importers that purchase from resellers are subject to liquidation of their duties at the "all others" cash deposit rate set in the original investigation unless the importer requests a review of its reseller.
>
> As now implemented, Commerce's new interpretation of Section 1675(a)(2)(C) imposes potentially great costs on U.S. business. The "all others" rate is usually higher, and often significantly higher, than the rates calculated for individual producers in annual reviews. The all others rate, moreover, never changes throughout the duration of an antidumping order, even when the high investigation rates upon which it was based are superseded. Thus, the Federal Circuit's decision upholding Commerce's erroneous interpretation of Section 1675(a)(2)(C) dooms U.S. companies to pay excessive duties on every importation into the United States of subject goods purchased from resellers unless each reseller undergoes an individual review. . . .

(Pet. at 19-20). In this passage, Renesas refers to Commerce's 1998 proposed policy clarification, entitled *Antidumping And Countervailing Duty Proceedings: Assessment Of Antidumping Duties*, 63 Fed. Reg. 55361 (Dep't Commerce Oct. 15, 1998) ("*Proposed Clarification*"), which

proposed to require unreviewed entries purchased from resellers unaffiliated with the original manufacturer to be assessed at the "all others" rate.

In fact, the assessment policy described in the *Proposed Clarification* was not before the Federal Circuit or the CIT. The "all others" rate was not applied to Renesas; the application of the "all others" rate was not at issue in the Federal Circuit case or CIT cases; and neither the Federal Circuit nor the CIT addressed whether an importer of merchandise exported by an unreviewed reseller should receive the "all others" rate or some other rate. Rather, the *Proposed Clarification* did not become effective until May 6, 2003 – after the events giving rise to this case. *Antidumping And Countervailing Duty Proceedings: Assessment Of Antidumping Duties*, 68 Fed. Reg. 23954, 23961 (Dep't Commerce May 6, 2003) ("*Assessment Clarification*"); *Consolidated I*, 348 F.3d at 1006-07. Based on the effective date of this case, the new policy clarification did not apply. If this Court is interested in the issue, it should deny Renesas's petition and wait to review a case in which the "all others" rate was actually applied to an importer. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (dismissing a writ of *certiorari* as improvidently granted because deciding the case would require the Court to resolve a constitutional question that was entirely hypothetical).[8]

[8] Renesas also is wrong in asserting that the "all others" rate is "usually significantly higher than the rates calculated for individual manufacturers in annual reviews." (Pet. at 19). Rather, as Renesas admits, the "all others" rate "is the *weighted average* of the rates calculated for the individually investigated producers and exporters." (Pet. at 6) (emphasis supplied). Accordingly, the rate is sometimes

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2. The antidumping statute and Commerce's regulations provided Renesas with a vehicle for review of the reseller's pricing practices and the calculation of a rate specific to its entries

Renesas concedes that a statutory remedy was available that would allow it to avoid having its entries assessed at the cash deposit rate, and that this remedy remains available to other importers who purchase their goods from resellers unrelated to the manufacturer. (Pet. at 21). The remedy, of course, is to request an administrative review of the pricing practices of the reseller/exporter that resold the subject merchandise to the importer. Under the statute, 19 U.S.C. § 1675(a), and the regulation applicable to Renesas during the first and second reviews, "an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only a producer or *reseller* of the merchandise imported by that importer." 19 C.F.R. § 353.22(a) (emphasis supplied), *Antidumping Duties,* 54 Fed. Reg. 12742, 12778 (Dep't Commerce Mar. 28, 1989). Accordingly, Renesas easily could have prevented the application of the cash deposit rate to its entries simply by requesting a review of its reseller. Indeed, two other importers in the first administrative review took advantage of this mechanism and requested reviews of 16 Japanese resellers of DRAMs. JA 56-57, 60-62.

Renesas nevertheless argues that mere participation in the administrative review "will potentially cost importers many millions of dollars." (Pet. at 21). Renesas's

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higher and sometimes lower than the calculated rate for any individual manufacturer.

concern about the cost of participating in an administrative review, however, does not justify *certiorari* review. Rather, as the courts have acknowledged, it is a normal cost of business that must be weighed against the benefits of importing into the U.S. *See, e.g., J.S. Stone, Inc. v. United States*, 297 F. Supp. 2d 1333, 1344 (Ct. Int'l Trade 2003), *aff'd*, 111 Fed. Appx. 611 (Fed. Cir. 2004). Moreover, Congress enacted the current administrative review procedures to ascertain foreign producers' and exporters' pricing practices without imposing undue burdens on the parties. In particular, in the Trade And Tariff Act of 1984, Congress changed the antidumping law by making administrative reviews optional based upon the request of a party rather than mandatory as was the case under prior law. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 611(a)(1), 98 Stat. 2948, 3031 (1984); 19 U.S.C. § 1675(a).[9] Pursuant to this legislation, Commerce promulgated its regulations permitting importers to request a review of their resellers and providing for assessment at the cash deposit rate of those entries for which no review has been requested. 19 C.F.R. § 353.22(a), (e). Thus, Congress evaluated the benefits and burdens of administrative

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[9] The accompanying House Conference Report to the Trade and Tariff Act of 1984 states that this provision

> [I]s designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority. The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the conversion of cash deposits of estimated duties, previously ordered. . . .

H.R. Conf. Rep. No. 98-1156 at 180, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5298.

reviews and struck an appropriate legislative balance. *Certiorari* review is not warranted just because Renesas would have preferred a different legislative outcome (*i.e.*, one in which an importer of unreviewed entries from an unrelated reseller automatically receives the manufacturer's rate).

Renesas further argues that the Federal Circuit's decision

> [L]eads to irrational, if not bizarre, economic results. As an importer of a commodity product like DRAMs, Renesas followed the market and should have had the same review result as LG if Renesas had requested its own review of its reseller or of LG. Thus, seeking its own redundant review would have been pointless.

(Pet. at 20-21). *Consolidated I* addressed and dismissed this very argument:

> [I]mporters of the same merchandise can have different antidumping duties, just as the final results in this case established various importer-specific rates for those who participated in the review. The character of the merchandise does not control the assessment of duties, but the market forces in play at the time of each separate import transaction [do]. *The simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties.* Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties.

Consolidated I, 348 F.3d at 1005 (emphasis supplied).

Moreover, Renesas's argument is belied by its own business model. As an importer of a commodity product resold by a Japanese reseller unrelated to the manufacturer, Renesas apparently makes its profit exploiting differences between the price of DRAMs in Japan and the price of DRAMs in the U.S. The price differences that allow Renesas to make a profit are the same price differences that would have yielded a different dumping margin if Renesas had only requested a review. In any event, absent an administrative review of the Japanese resellers' pricing practices, no one can be certain that Renesas's DRAMs were priced the same as LG's DRAM shipments to the United States.

3. Review of the Federal Circuit's decision would require this Court to engage in a duplicative, fact-specific inquiry

The Federal Circuit's decision does not warrant *certiorari* review because such review necessarily would entail a detailed examination of the facts duplicative of the one already undertaken by the Federal Circuit. As noted above, the Federal Circuit held that Commerce "'has consistently liquidated unreviewed entries [from unrelated resellers] at the cash deposit rate.'" *Renesas Tech. Am., Inc.*, No. 04-1473, -1474 (Pet. App. at 2) (citations omitted).[10] The Federal Circuit reached this conclusion after

[10] Throughout its Petition, Renesas asserts that Commerce's "long-settled policy" was to assess unreviewed entries purchased from resellers unaffiliated with the manufacturer at the manufacturer's rate. (Pet. at 13, 14, 15, 19). The Federal Circuit's examination of the extensive factual record of Commerce's historic assessment practice in *Consolidated II* completely contradicts Renesas's assertion. For a thorough discussion of Commerce's historic assessment practice, *see*

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examining over 100 pages of Commerce's liquidation instructions representing years of Commerce's assessment practice. This Court should not exercise *certiorari* jurisdiction to repeat a factual inquiry already conducted by the Federal Circuit in both *Consolidated II* and this case. S.Ct.R. 10 ("A petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

B. The Federal Circuit Correctly Decided The Case

It is undisputed that Renesas failed to request a review. It also is undisputed that Renesas's entries were not actually examined during Commerce's review of the manufacturer's U.S. sales. As shown below, no other review request by any other party encompassed Renesas's entries. Based on these facts, the Federal Circuit held that "an unreviewed reseller is not statutorily entitled to the manufacturer's review rate. . . ." *Renesas Technology America, Inc.*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13278 (Fed. Cir. July 1, 2005) (Pet. App. at 2). The Federal Circuit's decision was based expressly on *Consolidated I*, which concluded that, "[i]f the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The 'entries' must be 'covered by the determination' to gain entitlement to the review's results as the

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Consolidated II, 412 F.3d at 1270-72. Moreover, under Commerce's "knowledge test," discussed below, the producer's rate could not be used for Renesas's entries. The producer did not set the prices of Renesas's DRAMs, which Commerce examines during the administrative review.

'basis for the assessment' of duties." *Consolidated I* at 1005-06. The Federal Circuit also held that Commerce "'has consistently liquidated unreviewed entries [from unrelated resellers] at the cash deposit rate.'" *Id.* Renesas disputes these conclusions on several grounds, none of which has merit.

Renesas first argues that Micron's request for a review of "the subject merchandise manufactured and/or sold by" LG Semicon, the manufacturer, during the first and second reviews meant that all LG-manufactured entries, including Renesas's, were "covered by the determination." (Pet. at 22-25). Renesas is wrong. Under the regulation in effect during the review, a domestic interested party "may request in writing that the Secretary conduct an administrative review of *specified* individual producers or *resellers* covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers." 19 C.F.R. § 353.22(a)(1) (emphasis supplied).[11]

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[11] Commerce used similar language in the *Federal Register* notices announcing the opportunity to request administrative reviews:

> For antidumping reviews, the interested party must specify for which individual producers or resellers covered by an antidumping finding or order it is requesting a review, and the requesting party must state why the person desires the Secretary to review those particular producers or resellers.

Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review, 59 Fed. Reg. 23051, 23052 (Dep't Commerce May 4, 1994); *Antidumping Or Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request An Administrative Review*, 60 Fed. Reg. 24831, 24832 (Dep't Commerce May 10, 1995).

The Federal Circuit and the CIT have interpreted this regulation as requiring the domestic industry to identify *by name* the exporters for which it seeks a review before that exporter's entries are included within the scope of the request. *Floral Trade Council v. United States*, 888 F.2d 1366, 1369 (Fed. Cir. 1989) ("[Commerce] acted in accordance with its regulation when it declined to implement [petitioner's] request for review of importers and their unnamed suppliers because the request was not for review of 'specified individual manufacturers, producers, or exporters. . . .'"); *Floral Trade Council v. United States*, 17 CIT 1417, 1418 (1993) (section 353.22 of Commerce's regulation "may reasonably be interpreted as requiring requesters to *name* exporters and producers") (emphasis in original). Because Micron did not name Renesas's reseller, Micron's review request cannot be interpreted as covering Renesas's entries, and Renesas had no right to expect that its entries would be covered by the review.[12]

Renesas further argues that, "when Commerce conducts a review of a foreign party in its capacity as a *producer* pursuant to a request for such a review, all 'entries of merchandise' produced by that company are 'covered by the determination' in the annual review such that the determination 'shall be the basis for the assessment of' antidumping duties on entries of the merchandise pursuant to 19 U.S.C. § 1675(a)(2)(C)." (Pet. at 24). According to Renesas, therefore, Micron's request for a review of LG Semicon in its capacity as a producer necessarily included all LG-produced DRAMS, including those

[12] In fact, Micron did not even know of the existence of Renesas's first and second review entries until Renesas filed its complaint in the CIT.

sold to unrelated third party resellers. (Pet. at 24). Renesas's statement of the law is incomplete and misleading. Under its long-standing and judicially endorsed practice, Commerce employs the "knowledge test" to determine whether resold entries are "covered by the determination."[13] Under the "knowledge test," Commerce does not include in its administrative reviews U.S. sales made through unaffiliated resellers without the knowledge of the manufacturer that the sales were destined for the United States. The reason for the "knowledge test" is straightforward: If the producer does not know that subject merchandise sold to a third party reseller was destined for the United States, the producer cannot include those sales in its U.S. sales database submitted to Commerce by that producer and considered by Commerce in its review. Also, if a producer does not have knowledge that its merchandise is destined for the United States, its price to the unaffiliated reseller cannot be considered a "U.S. price." Instead, it is a price to the market in which the reseller is located, in this case, Japan.

The record below makes clear that LG Semicon had no knowledge of Renesas's entries. In accordance with its "knowledge test," Commerce's second review questionnaire asked for information regarding entries of subject merchandise sold

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[13] Contrary to Renesas's suggestion that the "knowledge test" was invented as part of Commerce's assessment policy clarification, (Pet. at 12, citing *Proposed Clarification*), the "knowledge test" has been an integral part of Commerce's practice for many years and has been sustained by the courts. *See, e.g., LG Semicon Co. v. United States*, 23 CIT 1074, 1079 (1999) ("Commerce's application of the 'knew or should have known' standard is in conformance with legislative history, is a consistent practice of the agency, and has been previously sustained by [the CIT]"), and cases and administrative determinations cited therein.

through a reseller that LG Semicon knew were destined for the United States. JA 111. (*See* Attached Appendix at App. 9). In its questionnaire response, LG Semicon denied having any knowledge of such sales. *Id.* As a result, the weighted average dumping margin calculated by Commerce for LG Semicon's U.S. sales did not include Renesas's entries.

Because Micron's review requests did not specify Renesas's reseller, and because LG Semicon was unaware that subject merchandise it sold to the reseller had been imported into the U.S. by Renesas, Renesas's entries were not covered by the reviews. In fact, it was abundantly clear to Renesas that its entries were not covered by the review. If its entries had been reviewed, Renesas would have received an antidumping duty questionnaire and would have had to submit sales data to Commerce, which it did not do. Renesas is a sophisticated importing company with sophisticated counsel. It knew quite well that its entries were not examined in the review because it received no questionnaire and did not answer any questions regarding its exports to the U.S. Therefore, to interpret Micron's requests in the manner proposed by Renesas would permit entries about which Commerce had no pricing information to be presumptively assessed the rate established for the producer. There is no statutory, regulatory, or policy support for such an interpretation.

Renesas next contends that Commerce correctly uses the manufacturer's investigation rate as the cash deposit rate for all importers' entries, but engages in "incongruous treatment" when it uses the manufacturer's calculated assessment rate for the manufacturer's entries and the manufacturer's cash deposit rate for the reseller's entries.

(Pet. at 25-26). Commerce explained the rationale for this practice in its *Proposed Clarification*:

> If there is no company-specific reseller cash deposit rate and the importer identifies the producer [as the manufacturer of the merchandise], the Department instructs Customs to apply the producer's cash deposit rate to the entry. This logic stems from the fact that, when subject merchandise enters the United States through a reseller, the Department does not know who set the price of the subject merchandise to the United States. The Department instructs Customs to apply the producer's cash deposit rate where the producer of the merchandise is identified on the assumption that the producer knew that the merchandise was destined for the United States. This assumption is more often true than not.

Proposed Clarification, 63 Fed. Reg. 55361, 55362 (Dep't Commerce Oct. 15, 1998). Of course, when the producer disclaims knowledge that merchandise sold to the third-country reseller was destined for the United States, as LG Semicon did here, there is no reason to assess those entries at the producer's final calculated assessment rate. Thus, there is nothing "incongruous" about Commerce's different treatment of these different situations. Rather, it is a natural consequence of Commerce's application of the "knowledge test."

Renesas also contends that Commerce advised that "entries of *all* subject merchandise produced by the reviewed producers would be treated according to the results of the reviews for the producers." (Pet. at 11, citing the "Futtner Memorandum"). In fact, the Futtner Memorandum was drafted to address a liquidation issue completely unrelated to the one raised by Renesas, that is, the assessment rates for

certain "Japanese resellers for whom administrative reviews have been requested." JA 71. Because Renesas did not request a review of its reseller, the Futtner Memorandum is inapposite. In addition, Renesas could not have relied on the Futtner Memorandum in deciding not to request a review of its entries, because the memorandum was issued *after* Renesas's opportunity to request a review in the first review had expired.[14]

Renesas next argues that (i) the third review liquidation instructions covering LG Semicon-produced entries ordered liquidation at the manufacturer's rate of entries that allegedly involved reseller transactions, including Renesas's; and (ii) the first and second administrative review liquidation instructions covering entries produced by Hyundai, another Korean DRAMs producer, ordered liquidation at the manufacturer's rate of all entries,

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[14] The Futtner Memorandum was placed on the record of the first administrative review on June 15, 1994, after the opportunity to request a review had passed on May 31, 1994. *See Opportunity To Request An Administrative Review*, 59 Fed. Reg. 23051 (Dep't Commerce May 4, 1994).

Even if the Futtner Memorandum advised Renesas that its entries would be covered by the review, which it did not, Renesas would not have been entitled to rely on it because its interpretation of the memorandum is contrary to the automatic assessment regulation, 19 C.F.R. § 353.22(e), and because, under Commerce's delegation of authority and controlling case law, Mr. Futtner, a low level employee, was in no position to bind Commerce. 19 C.F.R. § 353.2(u) (delegating to the "Assistant Secretary for Import Administration the authority to make final determinations under [the administrative review provision]"); Department Organizational Order 10-3 (prohibiting redelegation of authority beyond the Assistant Secretary for Import Administration) JA 33-36; *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 384 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

including unreviewed entries of unrelated resellers. (Pet. at 11-12).

There is no record evidence of any reseller transactions that were made without the knowledge of LG Semicon in the third review,[15] none is cited anywhere in the six-year history of this case, and the third review instructions make no mention of any resellers or any announced Commerce practice with respect to the assessment of unreviewed entries of unrelated resellers. JA 116-17. Rather, the instructions simply refer to "all shipments" in much the same manner as the instructions considered and rejected as inconclusive of Commerce's practice by the *Consolidated II* Court. *Consolidated II*, 412 F.3d at 1271.

Similarly, there is no record evidence of any reseller transaction involving Hyundai-produced DRAMs in the first or second administrative reviews made without Hyundai's knowledge.[16] As pointed out in the briefs and at oral argument before the Federal Circuit, the first and second administrative review instructions for Hyundai-produced DRAMs do not state that DRAMs were imported

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[15] Renesas claims that it made entries during the third administrative review and that those entries were liquidated at the manufacturer's rate. (Pet. at 12). Renesas, however, cites no record evidence for this assertion, and there is none. At oral argument before the Federal Circuit, counsel for Micron pointed out that no record evidence supported Renesas's assertion, and counsel for Renesas failed to rebut this fact with any cite to the record or any other document.

[16] In fact, it is doubtful there were any unreviewed entries of unrelated resellers involving Hyundai-produced DRAMs, as Hyundai had its own U.S. subsidiary, Hyundai Electronics America, which it used to enter its imports. *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216, 20217, Cmt. 1 (Dep't Commerce May 6, 1996).

into the United States without the knowledge of the producer. JA 111(4)-(5), 118-19, 120-25. Nor do they refer to the existence of any resellers or any Commerce assessment practice for unreviewed entries of unrelated resellers. *Id.*

VI. CONCLUSION

For the foregoing reasons, Renesas's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Counsel for Respondent,
Micron Technology, Inc.

APPENDIX

[JA 106]

[LOGO]

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230
A-580-812
ARP 05/01/94-04/30/95
Public Document

Goldstar Electron Co. Ltd/LG Semicon Co., Ltd.
c/o Michael P. House
Kaye, Scholer, Fierman, Hays & Handler
Suite 1100
901-15th Street, N.W.
Washington, DC 20005-2327

Jun. 26, 1995

Dear Mr. House:

I am writing to you on behalf of Import Administration, a unit of the United States Department of Commerce. On June 15, 1995, we initiated an administrative review to determine whether imports into the United States of a product that you are believed to produce and/or export were sold at prices that constitute dumping. We are examining sales, entries or shipments, as specified in the enclosed questionnaire, during the period May 1, 1994 through April 30, 1995. The products under review are dynamic random access memory semiconductors from the Republic of Korea. The antidumping duty order concerning this product went into effect on May 10, 1993.

We require the information requested in the enclosed questionnaire to determine whether subject merchandise that you produced and/or exported was in fact sold in, or to, the United States at prices below the normal value of the merchandise. General instructions for responding to the questionnaire follow immediately after the table of contents. We have divided the questionnaire itself into five

sections, A through E, and attached supplemental information, including a glossary of terms, in Appendices I through IV.

We request that you respond to sections A (General Information), B (Sales in the Home Market or to a Third Country), and C (Sales to the United States). If after examining sections A and C of the questionnaire you conclude that your company and its affiliates did not have any U.S. sales or shipments during the period identified above, please submit a statement to that effect, following the data submission requirements specified in the general instructions. If you do not submit such a statement for the administrative record in this case, we may conclude that your company has not been responsive to this questionnaire and may proceed on the basis of the facts available, as defined in the glossary of the attached questionnaire.

You are requested to respond at this time to the Cost of Production (COP) portion of section D if we disregarded below-cost sales in the most recently completed review or investigation of your company. Otherwise, you are not presently required to respond to the COP portion. However, if the petitioner or other U.S. domestic party alleges that your sales in the comparison market were made at prices below the cost of production, we may request at a later date that you respond to the COP portion.

[JA 107]

If you are required to respond to the COP portion of section D for any of the reasons stated above, you must also respond to the Constructed Value (CV) portion of section D with respect to all products or models sold in the United States. If you are not required to respond to the COP portion, we request that you respond to the CV portion with respect to products or models sold in the United States for which you had no contemporaneous sales of comparable merchandise in the comparison market, or if the contemporaneous sales that you report were made to affiliates.

If the subject merchandise was further processed in the United States, you are generally required to respond to section E (Cost of Further Manufacture or Assembly Performed in the United States). However, if you believe the value added in the United States exceeds substantially the value of the merchandise imported into the United States, please contact the official in charge immediately.

Please refer to the cover page and general instructions of the enclosed questionnaire [illegible] period covered by this review, the due dates for responding to the questionnaire [illegible] instructions for filing the response. If you have any questions about those or any other [illegible], please contact the official in charge.

If you are unable to respond to this questionnaire within the specified time limits or are unable to provide the information in the form required, please contact the official in charge of this review. We will attempt to accommodate any difficulties that you encounter in answering this questionnaire. However, that accommodation cannot conflict with our obligation to conduct the review

within the timeliness and informational requirements of United States law. In order to complete this review within the statutorily mandated deadlines and to ensure that all interested parties have a sufficient opportunity to participate in this proceeding, extensions will not ordinarily be granted.

Sincerely,

/s/ Thomas F. Futtner
Thomas F. Futtner
Program Manager, Division I
Office of Antidumping
Compliance

App. 5

[JA 108]

PUBLIC VERSION

BEFORE THE
UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS OF ONE MEGABIT AND ABOVE FROM THE REPUBLIC OF KOREA	))))))	Case No. A-580-812 Second Administrative Review PUBLIC VERSION

RESPONSE OF LG SEMICON CO., LTD. AND LG SEMICON AMERICA, INC. TO THE DEPARTMENT OF COMMERCE REQUEST FOR INFORMATION

Michael P. House
Raymond Paretzky

Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
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Washington, D.C. 20005
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Response to Section A

August 29, 1995

[JA 109]

PUBLIC VERSION

SECTION A

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PUBLIC VERSION

LG SEMICON CO., LTD.
2ND ADMINISTRATIVE REVIEW

SECTION A

Organization, Accounting Practices, Markets and Merchandise

LG Semicon Co., Ltd. ("LGS") and LG Semicon America, Inc. ("LGSA") (collectively, "LG Semicon") hereby respond to § A of the Department's questionnaire.

1. *Quantity and Value of Sales*

Information on the quantity and value of sales is necessary to determine whether we will attempt to compare the prices of merchandise under review sold to the United States market to (a) the prices of comparable merchandise in your home market, (b) prices of comparable merchandise in a third-country market or (c) constructed value.[1] *Refer to the term viability in the Glossary of Terms at Appendix I for a more complete discussion.*

For the remainder of this section of the questionnaire we refer to the home market or third-country market selected

[1] *Throughout this questionnaire, whenever we refer to the "products under review" or "merchandise under investigation," we are referring generally to all products within the scope of the order that your company sold during the period of review in any market. When we use the term subject merchandise, we are referring to products sold to the United States. When we use the term foreign like product, we are referring to products sold in your home market or exported to a country other than the United States. We have provided a description of the merchandise included in the review in Appendix III.*

for the calculation of normal value as the comparison market.

a. State the total quantity and value of the merchandise under review that you sold during the period of review ("POR") in:

[JA 111]

PUBLIC VERSION

9. Exports Through Intermediate Countries

If you are aware that any of the merchandise you sold to third countries was ultimately shipped to the United States, please contact the official in charge within two weeks of the receipt of this questionnaire.

9. Not applicable.

10. Sales of Merchandise Under Review Supplied by an Unaffiliated Producer

Please respond to this section of the questionnaire if neither your company nor an affiliate produced the merchandise under review which you sold in either the comparison market or to the United States.

10. Not applicable.

(4)

No. 05-986

IN THE
Supreme Court of the United States

RENESAS TECHNOLOGY AMERICA, INC.,
Petitioner,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEFS IN OPPOSITION

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April 25, 2006

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Renesas Technology America, Inc. ("Renesas") incorporates by reference the Corporate Disclosure Statement included in its petition for writ of certiorari filed February 2, 2006.

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REPLY TO BRIEFS IN OPPOSITION

Renesas respectfully offers this reply in support of its petition for writ of certiorari. Notwithstanding the objections raised by the government and Micron Technology, Inc. ("Micron"), this Court should grant Renesas' petition for the reasons set forth in its petition filed February 2, 2006, and the further support provided herein.

I. Respondents Do Not Dispute That the Federal Circuit Decision Imposes Substantial Costs on U.S. Importers That Purchase from Resellers

Neither the government nor Micron disputes that the Federal Circuit's decision imposes substantial costs on U.S. importers that purchase from resellers. Under the Federal Circuit decision, importers of goods subject to antidumping duties that purchase from resellers are required to pay excessive duties, unless such importers opt to seek costly and redundant administrative reviews of goods sold by the reseller. *See* Pet. at 19–21.

Micron argues that only .5 percent of all U.S. imports are subject to antidumping duties, and that "only a fraction" of those imports are purchased from resellers. Micron Opp. Br. at 13–14. However, "only a fraction" of a very large number is still a large number. As Micron concedes, *see id.*, antidumping duties were imposed on an average of $1.4 billion worth of imports per year from 1994 to 2003. If only 25% of such duties involved imports of goods from resellers, the Federal Circuit's decision would affect

duties imposed on $280 million worth of imports every year.

II. The Question Presented Here Involves a Question of Statutory Interpretation of Continuing Importance

Both the government and Micron attempt to minimize the significance of the Federal Circuit's decision. The government argues that the decision does not create a circuit conflict, and that the issues presented in this case are not likely to recur due to revised regulatory provisions. U.S. Opp. Br. (Hitachi)[1] at 9. Micron argues that the non-precedential character of the Federal Circuit opinion renders it unworthy of review, and that the issues here are not likely to recur, but for different reasons than those offered by the government. Micron Opp. Br. at 14–16.

These straw men arguments are easily disposed of. Because the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade, *see* 28 U.S.C. § 1295(a)(5), it is of course impossible for a circuit conflict to exist over an issue of trade law. The Federal Circuit has the only and last word for the entire nation on this issue—subject to this Court's review. And while it is true that the Federal Circuit decision sought to be

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[1] The government's Memorandum in Opposition to Renesas' petition incorporates by reference the government's Brief in Opposition to the companion petition for certiorari filed by Hitachi High Technologies America, Inc., docketed as No. 05-918.

reviewed here is unpublished and non-precedential, it followed the holding of a published, precedential Federal Circuit decision, *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003) (*Consolidated Bearings I*), "that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate." Pet. App. 2, citing Pet. App. 26–49. *Consolidated Bearings I* established a precedential rule of statutory construction of 19 U.S.C. § 1675(a)(2)(C) that the Federal Circuit followed in this case, and that rule of statutory construction is worthy of review precisely because it will continue to govern antidumping cases in the Federal Circuit. Renesas' petition for certiorari squarely presents this important issue.

The issue of statutory construction involved in this case is not mooted or otherwise rendered unlikely to recur because of the (different) reasons cited by the government and Micron. The government asserts without further explanation that "the issues presented in this case . . . are unlikely to recur due to revised regulatory provisions." U.S. Opp. Br. (Hitachi) at 9. Later, the government notes that the regulatory language governing requests for review has been slightly changed since the reviews at issue in this case. *See id.* at 3 n.2, 13–14. The government, however, never disputes Renesas' statement that these slight changes are not substantive. *See* Pet. at 8 n.2. In any event, the resolution of the question presented turns upon *statutory*, as opposed to regulatory, language. The question presented is "[w]hen a request for administrative review of antidumping duties

encompasses goods manufactured by a producer, does 19 U.S.C. § 1675(a)(2)(C) require that the review results be the basis for the assessment of duties on imports when the importer purchases the goods from a third-party reseller rather than directly from the producer?" Pet. at i. As Renesas argues, the statutory language alone compels the conclusion that the scope of the request for review determines the scope of "merchandise covered by the determination" under Section 1675(a)(2)(C). Pet. at 22–23. To be sure, Renesas also argues that regulatory language *additionally* supports its argument, *id.* at 23–24, but Renesas' argument does not turn upon regulatory language.

Micron argues that this case does not involve a recurring controversy worthy of review because the assessment policy imposed by Commerce on Renesas (based on the producer's cash deposit rate) is different from the assessment policy now imposed by Commerce on importers (based on "all others" rate). *See* Micron Opp. Br. at 15–16. Micron does not dispute, however, that *both* the previous assessment policy and the current assessment policy suffer from the same defect that Renesas complains of: the failure to assess such duties in accordance with review results as mandated by 19 U.S.C. § 1675(a)(2)(C). *See* Pet. at 14 n.7. Because the current assessment policy disadvantages Renesas and similarly situated importers in the same fundamental way as the previous policy, the question presented is of continuing general significance. *See Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S.

656, 662 (1993) (changes to challenged statute did not moot the controversy because the amended statute disadvantaged the plaintiffs in the same fundamental way as the prior version of the statute); *Rosetti v. Shalala*, 12 F.3d 1216, 1233 (3d Cir. 1993) (changes in regulations did not moot statutory claim when changes did not provide full relief sought by plaintiff under the statute).

III. The Question Presented Involves an Issue of Statutory Construction, Not an Issue of Fact

Micron argues (Micron Opp. Br. at 20–21) that accepting review here would entail review of the Federal Circuit's factual determination in this case and in *Consolidated Bearings II*[2] that Commerce "has consistently liquidated unreviewed entries at the cash deposit rate." Pet. App. at 2 (citing *Consolidated Bearings II*). On the basis of its prior decision in *Consolidated Bearings II*, the Federal Circuit here concluded that the assessment policy Commerce imposed upon Renesas was not "arbitrary, capricious, or an abuse of discretion." *Id.*

Micron's argument is wrong and misleading. The Federal Circuit in this case decided two distinct issues: first, as a matter of *law*, whether Renesas was statutorily entitled to the producer's review rate, and second, as a matter of *fact*, whether the assessment policy Commerce imposed upon Renesas

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[2] *Consolidated Bearings Co. v. United States*, 412 F.3d 1266 (Fed. Cir. 2005), Pet. App. 50–66.

so deviated from Commerce's previous practices such that it was arbitrary, capricious, or an abuse of discretion. The Federal Circuit decided both issues in favor of respondents Micron and the government. *See* Pet. App. at 2. In its petition for certiorari, Renesas only seeks review of the legal issue of statutory interpretation decided by the Federal Circuit. *See* Pet. at i. Nowhere does Renesas seek review of the Federal Circuit's factual determination in this case (based upon *Consolidated Bearings I*) that Commerce's assessment policy in this case does not represent a deviation from Commerce's past practices.

Thus, if this Court grants review of the question presented in Renesas' petition, it will not have to undertake any review of the factual issues associated with Commerce's past practices. Instead, this Court can assume, as found by the Federal Circuit, that Commerce's assessment policy with respect to Renesas was entirely consistent with Commerce's previous assessment policy. That still leaves open the other issue decided by the Federal Circuit in this case and presented to this Court, namely, whether Renesas was *statutorily* entitled to the producer's review rate because Micron's request for review applied to products "*manufactured and/or sold by*" the producer.

IV. Under the Statute, a Request for Review Determines the Scope of a Review

The government argues that under Section 1675(a)(2)(C), Renesas' entries were not covered by

Commerce's review because neither Renesas nor its reseller requested a review of those entries, and the producer provided no information regarding Renesas' imports as part of the review. U.S. Opp. Br. (Hitachi) at 10. Nevertheless, *Micron's* request for review did encompass Renesas' entries, because Micron's request for review applied to products "*manufactured and/or sold by*" the producer.

Under the statute, the scope of the administrative review turns on the scope of a request for review. *See* 19 U.S.C. § 1675 (after a request for review is made, Commerce is required to "review, and determine . . . the amount of any antidumping duty," *id.* § 1675(a)(1)(B), of "each entry of the subject merchandise," *id.* § 1675(a)(2)(A)). Thus, a request for review determines the scope of "each entry of the subject merchandise" included within the review, which in turn determines the scope of "merchandise covered by the determination" under Section 1675(a)(2)(C).

In this case, Micron requested that reviews be undertaken with respect to products "manufactured and/or sold by" the producer—a fact conspicuously ignored by the government in its opposition. Because the statute specifically contemplates that the denomination of a producer's products may apply to *both* products manufactured and sold by the producer, *see* 19 U.S.C. § 1677(28) (defining "exporter or producer" to mean the exporter of the subject merchandise, the producer of the subject merchandise, or *both where appropriate*") (emphasis supplied), Micron was entitled to make the broad

request that it did, and Renesas was entitled to rely upon that request in declining to seek its own redundant review.

The government argues that under the regulation in place in 1994 at the time of Micron's request, the definition of "reseller" excluded "producer," and therefore it would have been impossible to request a review of a producer that encompassed goods manufactured by the producer and in turn resold. *See* U.S. Opp. Br. (Hitachi) at 14 (citing 19 C.F.R. §§ 353.22(a)(1) and 353.2(s) (1994). The flaw in the government's argument is that it focuses on "reseller" rather than the crucial term "producer." Merely because the term "reseller" excluded "producer" by definition does not mean that the term "producer" in a request for review could not apply, as Micron's did, to goods "*manufactured and/or sold*" by a producer. Instead, as noted above, 19 U.S.C. § 1677(28) expressly contemplates that the denomination of a producer's products may apply to *both* producer sales and third party resales of the producer's products.

V. Commerce's Inconsistent Treatment of Prospective Cash Deposits and Retrospective Duty Assessments Shows that Commerce's Statutory Construction Is Untenable

The statute is clear: The results of an administrative review apply "for the assessment of . . . antidumping duties on entries of merchandise covered by the determination *and* for deposits of

estimated duties." 19 U.S.C. § 1675(a)(2)(C) (emphasis added). Although the statute thus requires that the results of a review apply to *both* cash deposits of prospective estimated duties as well as the assessment of retrospective actual duties, Commerce does not apply review results equally. While Commerce admits that review results do apply to *cash deposits*, Commerce does not accord review results to actual duties. At the time of review at issue in this case, Commerce assessed retrospective actual duties on importers of resold products on the basis of the producer's cash deposit rate. Currently, Commerce assesses retrospective actual duties on such importers on the basis of the initial "all others" cash deposit rate.

Thus, Commerce's interpretation of the statute (both under the assessment policy applied in this case and under the policy currently applied today) is flatly inconsistent with the text of the statute, which requires that review results apply equally to *both* deposits and actual duties. Although the government tries to dodge this fatal inconsistency by arguing that the new policy is not at issue in this case, *see* U.S. Opp. Mem (Renesas) at 4, the former policy *is* at issue in this case, and the new policy contains the same defect as the former policy. The former and the existing policy both reveal Commerce's statutory construction in this case to be untenable.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari filed February 2, 2006, this Court should grant Renesas' petition.

Respectfully submitted,

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